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A

GENERAL ABRIDGMENT

OF

PL. 9. 90

CASES

IN

EQUITY,

ARGUED AND ADJUDGED

IN THE

High Court of Chancery, &c.

WITH A

LARGE COLLECTION OF CASE

NEVER BEFORE PUBLISHED,

TO WHICH ARE ADDED,

ADDITIONAL REFERENCES TO THE PRESENT TIME, AND AN ALPHABETICAL TABLE OF THE NAMES OF THE CASES.

THE THIRD EDITION, CAREFULLY CORRECTED.

BY A GENTLEMAN OF THE MIDDLE TEMPLE.

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VOL. I.

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PREFACE,

TO THIS EDITION.

IN preparing this Edition for the Preſs, the principal Object has been to have it printed on the very beſt Paper, no expence having been ſpared.

The marginal References have been examined, and a new and numerous Selection of References to all the Reporters publiſhed ſince the laſt Edition has been added.

Among the References and Notes are ſome by the late DOMINICK TRANT, Eſq. who took a vaſt deal of Pains in collecting this Work; and from his Copy this Edition has been printed.

THE

THE

PREFACE.

As this Work appears unrecommended by any authoritative Approbation, or even a Name in the Title Page, which might introduce it with Advantage; it may perhaps be neceſſary to ſay ſomething in this Place relating to its Deſign, and the Pretence it makes of being Uſeful.

The principal Deſign of it, is to collect and diſpoſe, by way of Abridgment, under proper Heads, all ſuch Caſes adjudged in the Courts of Equity, as are any where in Print; and this is conceived to be a better Method than compoſing a regular Inſtitute of thoſe Matters: In the Way of Inſtitute, much muſt always be taken from the private Opinion of the Writer; in this of an Abridgment, Knowledge flows from the Points adjudged, and authentic Reſolutions which the Reader has before him.

In Purſuance of this Deſign, the Reader muſt expect to find ſeveral Caſes abridged from Books which he may reckon of little Weight or Authority; as well as ſeveral which have been contradicted by better and later Reſolutions; but that no Body may be miſled, the Caſes on both Sides, with their Reaſons, are generally laid down for the Reader to make his own Concluſions.

The Diviſion of the Heads is ſuch, as to the Author ſeemed beſt, and fitteſt to direct the Generality of Gentlemen acquainted with theſe Matters, to the Point they are in ſearch of, tho' it is not to be expected, that in this Article, every Body ſhould be ſatisfied, Men having ſuch different Modes of Thinking, that, in Strictneſs, hardly any Two can be ſaid to Common-place alike. All that can be done to

Remed

Remedy this Inconvenience, is to make proper References from Head to Head, where any Degree of Similitude appears; which has been attempted here.

It has been thought proper, under the Head of *Deviſes*, to inſert all the Caſes upon that Subject which have been determined in the Common Law Courts, as they receive the ſame equitable Conſtruction in them that they do in the others.

If that, and the making Obſervations in other Heads, how Equity differs from the Common Law, ſhould be thought to exceed the Deſign, it's hoped the Benefit of the Reader will make a ſufficient Apology for it, as alſo for the Author's Inſertion of ſeveral Caſes not hitherto in Print, which have been adjudged by thoſe excellent Chancellors, *Somers*, *Harcourt*, *Cowper*, and *Macclesfield*: Theſe Caſes in the Table are marked with an *Aſteriſk*, to diſtinguiſh them from thoſe extracted from the Books already publiſhed; and to prevent the Obſcurity which might happen from aiming at Conciſeneſs, they are given more at large than the others; which being already in Print every Reader has an Opportunity of applying to, when he conceives any Doubt concerning the Abridgment of them.

What perhaps moſt of all requires an Apology, is, that all the Caſes in this Book, adjudged ſince the Year 1726, were taken by the Author, in Chancery or at the Rolls; all that he offers in Excuſe is, that he uſed his utmoſt Care and Judgment; but he is aſſured, that if they ſuffer nothing by paſſing thro' his Hands, the great Abilities and unqueſtionable Integrity of the Learned and Honourable Perſons preſiding in thoſe Courts, muſt render them the moſt uſeful Part of this Work.

THE

THE

NAMES

OF THE

CASES.

Thoſe Caſes marked with a † are now in the Modern Reports, and regularly referred to in the Margin of each Caſe.

Thoſe marked with a * are not to be found in the Reports publiſhed before.

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(C) *In what manner may a Suit be revived.*

(A) *What ſhall abate the Suit* & econt'.

1. A. Made *J. S.* and his widow executors; the widow was made executrix upon condition that ſhe did not marry; they exhibit a bill, and pending the ſuit, the widow marries; and it was adjudg'd upon a reference to *Bridgman*, C. J. that the widow's marriage (*a*) abated the ſuit, altho' it was urged that her executorſhip was only conditional. 18 *Car.* 2. *Hamden* and *Brewer*, 1 *Chanc. Ca.* 77.

(*a*) If any of the parties, plaintiffs or defendants, die, or if a feme plaintiff marries, regularly the ſuit abates; but with reſpect to an abatement by the death of the parties, it muſt be by the death of ſuch as are ſo far material parties, and concerned in Intereſt, as to make it neceſſary to have their repreſentatives before the court, before there can be a final determination of the cauſe.

2. If a promiſe be made to the huſband and wife during coverture, and they bring a bill for performance, and pending the ſuit, the wife dies, yet this ſhall be no abatement. *Cary* 88. *Thorne* and *Brend & al'*, 19 *Eliz. For the whole intereſt ſurvived to the huſband.*

3. So if the huſband and wife ſue in the wife's right, and pending the ſuit, the huſband dies, yet the wife may proceed. Dr. *Pary* and *Juxon*, *Hil.* 21 & 22 *Car.* 2. *Bridgman* L. K. 3 *Chan. Rep.* 40.

4. So if a bill be exhibited for a legacy againſt baron and feme, who is executrix of the teſtator, and pending the ſuit the huſband dies, this ſhall be no abatement of the proceedings; but had it been concerning the wife's inheritance, it might be otherwiſe. *Mich.* 1691. *Shelberry* and *Briggs*, 2 *Vern.* 249.

5. If jointenants, or tenants in common exhibit a bill, and pending the ſuit one of them dies; yet *per Bridgman* L. K. the ſuit ſhall not abate. *Wright* and *Dorſet*, 24 *June* 1671. 3 *Chanc. Rep.* 66. *But Q. as to tenants in common, for a right deſcends to their repreſentatives.*

6. If a cauſe has been heard on a bill of interpleader, and a trial at law has been directed to ſettle the right between the defendants, this puts an end to the ſuit as to the plaintiff; ſo that if he afterwards dies, the cauſe ſhall ſtill proceed, and there needs no revivor; each defendant being in the nature of a plaintiff. Ruled on motion, *M.* 1685. *Anon.* 1 *Vern.* 351.

7. The legal eſtate in queſtion in this caſe was veſted in two of the defendants as truſtees in fee, and the equitable intereſt in fee in another of the defendants; and the bill was brought by the plaintiff now *Earl* of *Winchelſea*, the *Earl* of *Nottingham* and his four ſons, to ſupply the defective execution of an agreement made by the lord *Winchelſea*'s father, whereby the eſtate was to be ſettled on the plaintiffs ſeverally for life, with remainder to their firſt and other ſons ſucceſſively in tail, and a decree was obtained accordingly; and it was referred to the maſter to ſettle the conveyance; after which the *ceſtui que truſt* in fee dies; notwithſtanding which the *Earl* of *Nottingham* and his ſons attend the maſter, who reported that he approved of a draught of a conveyance, which was a conveyance only from the truſtees, in whom the legal eſtate was veſted, to the uſe of the plaintiffs, according to the decree; but the plaintiff *Finch*, now *Earl* of *Winchelſea* (who by a former ſettlement was to have been tenant in tail) took exceptions to the report; one of which was the abatement of the ſuit by the death of *ceſtuy que truſt*, and that the maſter had no power to proceed till the ſuit was revived. But the court over-ruled the exception, and held clearly that when there were ſeveral plaintiffs or defendants, that the death of any of them made an abatement of the ſuit only as to themſelves, and that the ſuit continued as to the reſt who were living; and therefore as to the defendants the truſtees, that they might well execute a conveyance of the legal eſtate, and were not to wait for any thing that was to be done by others; but if the plaintiffs ſhould hereafter deſire a conveyance of the equitable intereſt, they muſt revive againſt the heirs at law of the *ceſtuy que truſt*; and ſo in all caſes where any thing was required to be done by the repreſentatives of the party dying. It was likewiſe held, that if ſome of the plaintiffs refuſed to join in bringing a bill of revivor, that the others may bring ſuch bill, and make thoſe who refuſed defendants. And it was agreed, that a defendant might bring a bill of revivor, as well as the plaintiff. And it was likewiſe ſaid, that it was every day's practiſe to order money out of court to the party entitled by the decree, notwithſtanding the death of ſome of the parties. *Mich.* 1727. *Finch* and Lord *Winchelſea*.

(B) *Who may revive the Suit, and againſt whom.*

1. A (*a*) deviſee cannot bring a bill of revivor for want of privity, admitted, 1 *Chanc. Ca.* 174. *T.* 22 *Car.* 2.

2. *Per*

(*a*) The reaſons why regularly a deviſeeor aſſignee cannot bring a bill of revivor are, 1*ſt*, Becauſe a ſuit hath been looked upon as a *choſe in action*, and conſequently not aſſignable for fear of maintenance. 2*dly*, And which ſeems the better reaſon, becauſe where the party deviſes or aſſigns his intereſt and dies, if the deviſee or aſſignee were to bring his bill of revivor againſt the defendant, the heir or executor would be pretermitted, who might have a right to conteſt ſuch diſpoſition, and therefore he muſt bring his original bill, and make the heir or executor party.

r Cur': An assignee shall not have a *sci. fa.* to revive a that is not signed and inrolled; but after the decree is in- n assignee may bring a *sci. fa.* to revive it, in like man- law: If there be judgment for an annuity, and the annu- erwards sells the annuity, the vendee shall have a *scire fa-* his judgment; *M. 1684. *Dunn* and *Allen*, 1 *Vern.* 283. but *rn.* 426. S. C. where it is said that the *scire facias* was dis- for want of privity, and a bill of revivor was brought, and of by the master of the *rolls*, altho' it was objected that an or purchasor, who came not in in privity, could in no case but ought to bring an original bill to have a parallel decree n which it may be used as an argument to induce the court the like decree, that there was such former decree.

s when a devisee having brought an original bill in nature of revivor, and the question was, whether the defendant e at liberty to make a new defence, and it was held by *eper*, that where a bill, altho' an original, is only to sup- want of privity, and in all other matters as a bill of revi- e decree ought to be carried on in the same manner as it ave been on a bill of revivor, if the plaintiff had claimed ty; and there is no reason why the devisee should not have e advantage of the decree, as an heir or executor, without again into the merits of the cause; and the decree on this ht not to be longer or shorter than the first. *Clare* and *Wor- asch.* 1706. 2 *Vern.* 548.

o if a bill in nature of a bill of revivor be brought against a he cannot dispute the justice or validity of the decree; for would be in a better case than an heir or executor. *per* Lord *Harcourt*, Easter 1711. *Minshul* and Lord *Mohun*, 2 *Vern.* 672.

f there is a mutual account decreed, and there happens an ent, the defendant as well as plaintiff may in such case re- Lord *Stowel* and *Cole*; *vide supra* (A) Case 7. that the de- in any case may revive, as well as the plaintiff.

f an administrator obtains a decree, but dies before inroll- the administrator *de bonis non* may revive this decree with- equity of the (*a*) statute of 30 *Car.* 2. *c.* 6. *Owen* and 2 *Vern.* 237.

e bonis non may sue a *scire facias*, and take execution upon a judgment ecutor or administrator.

f a creditor is admitted by order to come in before the ma- nd prove his debt, and pay his contribution, he is entitled ve if the cause abates. *Trin.* 1702. *Pitt* and the credi- the Duke of *Richmond*.

f the plaintiff revives against two only, when there were three ants to the original suit, his bill shall be dismissed. *Cary* 78.

But it is not necessary to revive against a defendant who ne- swered. *Hil.* 1684. *Oxburgh* and *Fincham*, 1 *Vern.* 308.

If a man marries an administratrix, and the plaintiff obtains ee against him and his wife, and the wife dies, the plaintiff roceed against the husband without reviving against the ad- rator of the wife; but the husband is not bound to answer r than the estate he had with his wife. *Jackson* and *Rawlins* 1690. 2 *Vern.* 195.

* But tho' in the principal case L. K. disallowed the *scire facias*; yet it was without costs, because defendant might have demurred.

(*a*) By which it is enacted, that an admini- had in the name

11. The plaintiff's inteſtate had obtained a decree againſt defendant for payment of a ſum of money, and alſo for conve of lands and delivery of deeds; but before any thing was done it, died inteſtate; and the plaintiff having brought a *ſcire f* to revive the decree, the defendant demurs, becauſe the heir not made a party, and a decree cannot be revived by parts; the heir will not join as plaintiff, he ought to have been mad fendant. On the other ſide 'twas ſaid, that the heir and admini tor are not jointly concerned, and each may proſecute *pro inter* and cannot join; and if he had been made defendant, the d would not have been revived againſt him, becauſe the bill only have prayed it might have been revived, as to the per eſtate; and the court over-ruled the demurrer, and ſaid it was a judgment at law in waſte, where there may be two revivors being then objected that the *ſcire facias* is to revive the whol cree; whereas it ought to be only as to the perſonalty; the allowed the demurrer as to the realty, but ordered the decr be revived as to the perſonalty. *Ferrers* and *Cherry*, *Mich.*

(C) *In what manner a Suit may be revived.*

1. IF the ſuit abates, the plaintiff may bring either an ori bill or a bill of revivor, at his *(a)* election: adjudge tween *Spencer* and *Wray*, *Trin.* 1687. 1 *Vern.* 463.

(a) When a ſuit abates, the plaintiff may bring either an original bill, praying that a parallel decree may be made, or bill of re which revives all the proceedings had therein before the decree is ſigned and inrolled; the decree is ſigned and inrolled, it ought regularly to be revived by *ſcire facias*.

2. A bill of revivor upon a bill of revivor lies. *Mich.* 13 *C Hard.* 201. Agreed *per Cur'*, *Attorney General* and Sir *Ed Barkham* in *Scaccario*.

3. If one be named defendant in the original bill, who i alive, he ought not to be named in the bill of revivor, bec the ſuit never abated *quoad* him. *Ibid.*

4. But if named in the bill of revivor only, he may be n in every bill of revivor after, becauſe he was not named defe in the original bill. *Ibid.*

5. A cauſe being heard, and the decree ſigned and inrolled plaintiff (the ſuit having abated) brought a bill of revivor, an defendant inſiſted that he ſhould have revived by *ſcire facias*, t being a decree in the cauſe; but in regard there were proc ings relating to coſts, *&c.* after the decree was inrolled, which *ſcire facias* would not revive, the court held it well enough. *Car.* 2. *Croſter* and *Wiſter*, 2 *Chan. R.* 67.

6. If a cauſe has ſlept 12 months in court, there ſhall b proceedings had upon it, without firſt ſerving a *ſubpœna ad fac Attornat'*. *T.* 35 *Car.* 2. 1683. *Anon.* 1 *Vern.* 172.

CAP.

CAP. II.

Account.

) *Who are intitled to have an Account, againſt whom it lies, and in what Caſes.*
) *Matters to be brought into the Account, what ſhall be allowed or diſcounted, when an Accountant may charge and diſcharge himſelf, and how the Particulars are to be aſcertained.*
) *What ſhall be a good Bar to a Demand of an Account, and where an Account once ſtated ſhall be concluſive.*
le the ſeveral titles of *Guardians*, *Executors*, and *Truſtees*, how they ſhall be charged, and what Allowances they ſhall have.

Who are intitled to have an Account, againſt whom it lies, and in what Caſes.

Surviving factor may be compelled to account, not only for himſelf, but likewiſe for his co-factor, altho' it was admit- the (*a*) executrix of the dead factor was compellable, and ong merchants *jus accreſcendi* hath no place. *Paſc.* 21 *Car.* *comb* and *Rivers coram* Lord Keeper, *Rainsford* and *Wyld* 1 *Chan. Ca.* 127.

(*a*) By the common law none could be charged in account, but as in ſocage, bailiff, or receiver, except in favour of merchants, and for the advancement where by the law of merchants, one naming himſelf merchant, might have an acinſt another, naming him merchant, and charge him as his receiver. 1 *Inſt.* 372. *a.* . Remedies for or againſt the executors or adminiſtrators of guardians, bailiffs, and or for or againſt jointenants, tenants in common, their executors or adminiſtrators, ually had in chancery. And tho' now by the ſtatute 3 and 4 *Ann. cap.* 16. actions t may be brought againſt the executors and adminiſtrators of every guardian, bailiff, ver, and by one jointenant and tenant in common, his executors and adminiſtrators, e other, as bailiff, for receiving more than his ſhare, and againſt their executors and ators; yet ſtill are matters of account thought more properly cognizable in equity w, as the party can have a diſcovery of books, papers, and the benefit of the deoath; and eſpecially if there are mutual and variety of demands, in which caſes the y more eaſily have an equal meaſure of juſtice, by balancing or diſcounting them beter; and as this will give a court of equity juriſdiction, ſo will it likewiſe, if there nt parties concerned in intereſt; but if any doubt ariſes about a particular demand, directed to be aſcertained by an iſſue and verdict at law.

2. If a merchant employs his apprentice as a factor beyond who dies, the merchant ſhall have an account againſt the adſtrator of the apprentice. *Lee* and *Bowler*, *Mich.* 26 *Car.* 2. *Temp. Finch* 125.

3. It was held by the court, that an infant was not compe to account as factor, though it was urged, that by the cuſto merchants he may, but an infant may be executor, and ſha charged, becauſe the law enables him: So he may be charge trover, becauſe a tort, but not on contract, nor as bailiff, o goods to carry on a trade; and therefore when infants are fa their friends ſhould give ſecurity for their accounting. 1700. *Smally* and *Smally*.

4. A truſtee made a letter of attorney to *J. S.* to manage receive the rents and profits of the truſt eſtate, who did ſo, accounted to the truſtee; and now being ſued by the *ceſtui truſt*, inſiſted that the truſtee, and not he, was to account, and he having already accounted, he might be quiet as to the plai but he was decreed to account to the plaintiff. *Trin.* 34 *Ca. Pollard* and *Downes*, 2 *Chan. Ca.* 121. The reporter adds; That the truſtee was dead, but that was not yielded as the re

5. The aſſignee of commiſſioners of bankrupts brought a b have a diſcovery and account of money received by the defe on behalf of the bankrupt: The defendant pleaded, he recei only as a menial ſervant to the bankrupt, and had accounted to him already, and that the commiſſioners had already exa him upon interrogatories; but the plea was over-ruled. *Mich.* *Wagſtaffe* and *Bedford*, 1 *Vern.* 95. 2 *Vent.* 358. S. C. *But* re, *whether there were not circumſtances of fraud in this caſe, combination between the bankrupt and ſervant,*

6. For if a man by anſwer ſwears, that what he received ceived as a menial ſervant, and hath paid it over to his maſt ſhall not be put to account again, but he ought to diſcloſe this ter in his anſwer. *Hil.* 1682. *Anon.* 1 *Vern.* 136.

7. So on exceptions to a maſter's report, which had reporte defendant's anſwer inſufficient; Ld. K. declared, that it was cient for a ſervant or apprentice, in anſwer to a bill for a count, to ſay in general, that whatever he received, was by received and laid out again by his maſter's orders. *Mich.* *Potts* and *Potts*, 1 *Vern.* 208.

8. The plaintiff, who was adminiſtratrix to her brother, a tain in colonel *Churchill*'s regiment of marines, having pray account of his perſonal pay, and the pay of his ſervants, and the pay of the company; it was inſiſted upon, on behalf o defendants, that ſhe was only intitled to an account of the cap perſonal pay, and pay of his men, and not for the pay of the pany, altho' they ſeemed to admit that a captain for land-ſe was to recruit his company, but would have it there was a d ence when he was a captain of marines; or if the captain be intitled, yet his adminiſtrator was not; but L. K. decre account of the whole. *Hil.* 1711. *Bellaſis* and *Churchill*, 2 682.

9. *A.* had a title to ſome houſes, by a ſettlement made of on him and his wife, but being obliged to go beyond ſea, h the deed of ſettlement with his brother, who being afterwards

mitted a priſoner, the defendant entred and enjoyed the houſes ſeveral years; and it was decreed, that he ſhould account for the rents and profits to *A.* 29 *Car.* 2. *Liſter* and *Liſter, Rep. Temp. Finch* 285.

10. If a man, during a perſon's infancy, receives the profits of an eſtate to which the infant is entitled, and continues to do ſo for ſeveral years after the infant comes of age, before any entry is made upon him, yet he ſhall account for the profits throughout, and not during the infancy only. *Paſc.* 1699. *Yallop* and *Holworthy*, that an infant ſhall have an account of profits againſt an intruder; *vide* 1 *Vern.* 295. but if there be a verdict againſt his title, he muſt recover at law firſt.

11. But if there is no truſt nor infant in the caſe, nor any entry made by him who is entitled to the mean profits, equity will not decree any account of the rents and profits. Reſolved *per* Ld. Chan. in the caſe of *Hutton* and *Simpſon & Ux', & e contra, Mich.* 1716, 2 *Vern.* 722 & 4.

12. If there are three part-owners of a ſhip, and one of them refuſes to navigate the ſhip, and the other two do it againſt his conſent, and the ſhip is loſt in the voyage; yet he who refuſed ſhall contribute to the loſs in proportion, as he was entitled to have an account of profits, had there been any. *Strilly* and *Winſon*, 1 *Vern.* 297.

13. Two perſons agreed for the purchaſe of an eſtate in moieties between them, which eſtate was ſubject to ſeveral incumbrances, which were to be diſcharged out of the purchaſe-money; one of them had abatements made to him by ſome of the incumbrancers of ſeveral ſums due for intereſt, and otherwiſe, which they, in conſideration of ſervices and friendſhip, agreed ſhould be to his own uſe; yet on a bill brought for an account of the rents and profits, the Court would not allow him the benefit of theſe abatements, excluſive of the other; but held, that he muſt account for them, the purchaſe being made for their equal benefit, and on a mutual truſt between them. *Trin.* 1728. at the *Rolls, Carter* and *Horne.*

(B) *Matters to be brought into the Account, what ſhall be allowed or diſcounted, where an accountant may charge or diſcharge himſelf, and how the particulars are to be aſcertained.*

1. IF a mortgagee or truſtee manage the eſtate themſelves, there is no allowance to be made them for their care and pains; but if they employ a ſkilful bailiff, and give him 20*l. per Annum*, that muſt be allowed, for a man is not bound to be his own bailiff. *Per Cur'. Eaſter* 1685, *Bonithon* and *Hockmore.* 1 *Vern.* 316.

2. One deviſeth 250*l.* to his ſon, and makes his wife executrix, who marries another huſband; in a bill brought againſt them for the legacy by the ſon, the defendants would have diſcounted maintenance and education, which the court would not permit; for it was ſaid that the mother ought to maintain the child; but a ſum of money paid for the binding of him apprentice was allowed to be diſcounted. *Mich.* 33 *Car.* 2. *Anon.* 2 *Vent.* 353.

3. The

3. The plaintiff came as a gueſt to the defendant's houſe, at her invitation, and the defendant inſiſted on 5*l.* a week for diet and lodging, alledging, that ſhe being a perſon of quality, and courted by ſeveral noblemen, much was ſpent in entertainments, and prayed it may be allowed her in account; but Ld. Chan. ſaid, It was no honourable demand, and decreed an account without any ſuch allowance, it appearing that ſhe came at her invitation. *Arundell* and *Roll, Mich.* 1681. 1 *Vern.* 19.

4. A marriage ſettlement was to all the ſons of the marriage in tail mail ſucceſſively, and for want of ſuch iſſue, to the daughters, till the perſon next in remainder ſhould pay them 3000*l.* On failure of iſſue male, the poſſeſſion came to the daughters, who inſiſted that they ſhould hold the lands until the remainder-man thought proper to determine their eſtate by one intire payment; but on a bill brought by the judgment-creditors, who inſiſted to be let into a ſatisfaction ſubject to this charge, and in exoneration thereof, to have an account of the rents and profits, it was decreed at the rolls, that they ſhould account for the profits, and that the rent ſhould be applied, firſt to pay the intereſt, and then to ſink the principal, as in caſe of a common mortgage; which decree was affirmed by Ld. Chan. with this variation, that the principal ſhould not be ſunk by ſmall payments; but when a third part was raiſed beyond the intereſt then due, it ſhould go to ſink the principal; and ſo again when another third part was raiſed, *&c.* *Mich.* 1706. *Blagrave* and *Clunn*, 2 *Vern.* 523.

5. It was inſiſted upon (and not denied) to be a cuſtom between merchant and merchant, that all accounts ſhould be evened on either ſide, by way of eſtoppel, eſpecially when the buſineſs is of the ſame employment. 2 *Chan. Ca.* 7.

6. The defendant had a bond from the plaintiff for 50*l.* in 1684, and in 1685 the defendant lodged and dieted with the plaintiff, and in 1699 the defendant brought an action at law on the bond, againſt the plaintiff, who brought this bill to have a diſcount for the diet and lodging; and though there was no agreement for that purpoſe, and ſuch length of time paſſed, yet the maſter of the rolls decreed it to an account, and ſaid, that ſo it ſhould be if the defendant had been a bankrupt, the plaintiff ſhould have had a diſcount againſt the commiſſioners or aſſignees, and that a diſcount was natural juſtice in all caſes. *Hil.* 1699. *Arnold* and *Richardſon*.

7. So where two perſons had mutual dealings, but before their accounts ſettled, one of them died, and the ſurvivor brought a bill againſt his executors, to have an account; and that the plaintiff might (*a*) diſcount what he was to pay out of what the executors were to pay him; and it was decreed accordingly, although it was objected, it may make a *Devaſtavit* in the executors. *Mich.* 1701, *Beaumont* and *Grover*.

(*a*) That there may be a diſcount againſt the Commiſſioners or Aſſignees of a Bankrupt, *vide* 2 *Vern.* 428. the caſe of *Peters* and *Soame*.

8. The plaintiffs were aſſignees under a commiſſion of bankruptcy awarded againſt Sir *Juſtus Beck*, and brought this bill againſt the defendants, to compel them to aſſign and transfer to the plaintiffs ſeveral ſhares in their ſtock, to which Sir *Juſtus Beck* was intitled, and which in the year 1720 coſt him between 10 and 1200*l.* The defendants, by anſwer inſiſted, that Sir *Juſtus Beck* was one of the

Directors

directors of their company, and that in the year 1720, after his purchaſe of the before-mentioned ſtock, the company lent him about 12,000*l.* and inſiſted, that they ought not to be obliged to let the plaintiffs transfer or diſpoſe of the intereſt which Sir *Juſtus* had in their ſtock, without payment of the 12,000*l.* borrowed, and that by virtue of the act 5 *Geor.* 1. one account ought to be ſet off againſt the other; and for that purpoſe they had come in as creditors under the commiſſion of Bankruptcy, and had proved their debt; there was no pretence that the money was lent on the ſecurity of the ſtock; but it was inſiſted, that on the credit of the great parcel of ſtock, which Sir *Juſtus* had in their company at that time, that they lent him this money, and therefore would now ſtop his ſtock till payment thereof, or as far as the value of the ſtock would extend, which now by the great fall of ſtocks would by no means ſatisfy their debt; but it was decreed at the rolls, and that decree on an appeal affirmed by the Lord Chancellor, that the defendants ought to permit the plaintiffs, the aſſignees, to transfer and diſpoſe of the ſtock for the moſt they could make of it, and that they could not ſtop or retain the ſtock for their ſatisfaction, either before or by virtue of the ſtatute 5 *Geor.* 1. And it was reſembled to the caſe of the lord of a manor and his copyholders, that the lord could not refuſe to admit a perſon to whom one of the copyholders had ſold his eſtate, on account of any debt due to the lord by that copyholder; that as the lord of the manor in that caſe, though he had the freehold of all the copyhold eſtates in him, yet he had no right to any of the copyholders private copyhold; ſo here, though the company had the whole ſtock of the company in them in their corporate capacity, yet the ſtock of each proprietor was diſtinct, and veſted only in himſelf, wherewith the company had nothing to do further than they were inveſted therewith by the charter, or act of parliament wherewith they were incorporated and impowered, or ordered to transfer each one's ſtock by transfers to be made in the books of the company; which otherwiſe every proprietor might by deed, or otherwiſe, have transferred as he thought fit. And it was held, that this caſe differed from that of the *Hudſon's Bay Company*, decreed *per* Lord Chancellor, aſſiſted by *Raymond* C. J. and Mr. Juſtice *Price*, where there was an expreſs by-law to ſubject the ſtock of each member to ſatisfy the debts they ſhould owe to the company. And it was ſaid, that this was not like the Caſe of *Demandray* and *Metcalf*, where a banker lent 200*l.* on a pledge of jewels, and afterwards lent the ſame perſon a further ſum of money on his bare note; yet he was not admitted to redeem the jewels without payment of the note likewiſe; for there it was between two private perſons. And it was held not to be within the ſtatute of 5 *Geor.* 1. which ſpeaks only of mutual dealings and accounts, which is not this caſe, as Sir *Juſtus* had a fixt permanent intereſt in the ſtock, and the money borrowed without regard thereto. And the court held this was not like the caſe of partnerſhip, where if any of the partners borrowed any of the partnerſhip's money, his own ſhare ſhould be anſwerable for it, and he ſhould not be permitted to come into a court of equity, and pray an account of his ſhare of the partnerſhip, ſtock, and effects, without making ſatisfaction for the debt he owed to the partnerſhip; for this was a tranſaction between them as private perſons, and on a mutual credit

dit and truſt; but the loan of the 12,000*l.* in the preſent caſe to Sir *Juſtus*, was not in their corporate capacity, wherein only he ſtood related to them, and held his ſtock, but was a loan by them as private perſons, for which they could not ſtop his ſtock, which he held as a member of the company in their corporate capacity. *Trin.* 1728. *Meliorucchi* and *Royal Exchange Aſſurance Company.*

9. Colonel *Ruſſel* married the widow of Lord *North* and *Grey*, who was executrix of her huſband, and kept a book of accounts relating to his eſtate, and after ſhe married *Ruſſel*, the ſame book was kept and continued on. After he went over governor of *Barbadoes*, and his wife went with him, as did the ſervant that made and kept the book of account: And there was proof in the cauſe, that the book was made up from vouchers, and had paid great part of the monies: And the witneſſes believed all the other monies were paid, and the plaintiff charged the defendant only by the book; and upon exceptions taken to the maſter's report, the queſtion was, whether the maſter ought not to have allowed the book as a diſcharge as well as a charge; and after long debate, my Lord Keeper adjudged it ſhould be allowed as a diſcharge; and the rather in this caſe, becauſe Colonel *Ruſſel*, his lady, and the ſervant, were dead in *Barbadoes*, which amounted to length of time, which was always held a good reaſon for allowing of it, and ſo took it to be a good rule, and fit to be eſtabliſhed, that where a man was charged only by an oath, or a book, the ſame ſhould be his diſcharge; and the caſe of *Melliſh* and *Turner*, lately adjudged, was cited, where books had been loſt in the earthquake at *Smyrna*, ſo that the plaintiff could only charge the defendant *Turner* by his own books, the ſame books were admitted to be his diſcharge. *Mich.* 1701. *Darſton* and *Earl of Oxford & al' executors of Colonel Ruſſel.*

10. The defendant was a houſe-keeper, and her Aunt, who was a very old infirm woman, lived with her, and ſhe from time to time received the aunt's money for her, as any was paid; the aunt died inteſtate, and the plaintiff being intitled to a diſtributive part of her eſtate, brought a bill againſt the defendant, to diſcover what ſums of the inteſtate's money ſhe had received for the inteſtate. She by her anſwer ſets out ſeveral ſums ſhe had received for the inteſtate whilſt ſhe lived with her, and at what time, and that the inteſtate had immediately put them out again at intereſt, to ſuch and ſuch particular perſons, and ſet forth other ſums which ſhe had received and paid over to the inteſtate. The cauſe being heard without proof on either ſide, and an account decreed, which was referred to a maſter, he by his report charged the defendant with the ſums confeſſed by her anſwer to be received, and ſubmitted to the court, whether ſhe was not likewiſe to be diſcharged by the ſame anſwer. The maſter of the rolls ſaid, That though he looked on the defendant in this caſe to have acted only in the nature of a ſervant, who by the juſtice of this court may, on a bill brought againſt him by his maſter's executors, diſcharge as well as charge himſelf by his anſwer; yet as the defendant might in this caſe have proved her anſwer, as appears by the anſwer itſelf, and had not ſo done, he referred it back to the maſter, and each ſide to make what proofs they could; and he declared, that if the anſwer was diſproved, as to the ſums put out at intereſt, he ſhould give no

Credit

credit to it as to other particulars, elſe inclined it ſhould be a diſcharge too, as well as a charge. *Trin.* 1702. *Bayly* and *Hill.*

11. An account being of twenty years ſtanding, it was ordered, that the defendant may prove on oath what he cannot prove by books and cancelled bonds, it being of ſo long a ſtanding. *Peyton* and *Green*, 1 *Chan. Rep.* 146. An account of fourteen years ſtanding admitted to be proved by oath. 1 *Chan. Ca.* 127.

12. The Court will not allow any thing to be placed to account under the head of *general expences*; but the party muſt name the particulars. *Nel. Chan. Rep.* 117.

13. The defendant, on account, ſhall be diſcharged by his oath of ſums under forty ſhillings, but a party ſhall not, by way of charge, charge another perſon ſo. 2 *Chan. Ca.* 249. *Everard* and *Warren*, *Hil.* 30 & 31 *Car.* 2. 1 *Vern.* 283. *Mich.* 1684. in an anonymous caſe, S. P. where it is ſaid, that he muſt mention to whom paid, for what, and when; *vide* 1 *Vern.* 470. where it is ſaid, that the court being informed, that the courſe of the court was, that an accountant was to be allowed, on his own oath, all ſums not exceeding forty ſhillings each, ſo as the whole was not 100*l.* Declared that rule ſeemed very unreaſonable, and would conſider how to rectify it. *Trin.* 1687. *Whicherly* and *Whicherly*, 1 *Vern.* 470. 1 Bac. Abr. 16.

14. In an account between plaintiff a gardener, and defendant a ſeedſman, the defendant ſhall be allowed ſums under forty ſhillings, by way of diſcharge, upon his oath; but the plaintiff ſhall not be allowed any thing on his oath. *Marſhfield* and *Weſton*, 2 *Vern.* 176. *This is now the eſtabliſhed practice in Chancery.*

(C) *What ſhall be a good Bar to a demand of an Account, and where an Account once ſtated ſhall be concluſive.*

1. A Prays to have an account of the ſale of goods taken in execution at an undervalue; the defendant pleads, that before he bought the goods of the ſheriff, and afterwards, they were offered to the plaintiff for the ſame price he gave for them; and the plea was allowed good. *Hil.* 25 *Car.* 2. *Dean* and *Gavell & al'*, *Rep. Temp. Finch.* 111. Vid aut. 2 Will Rep. 631. *per Jekyl*, M. R. where it is ſaid that in this caſe the embezzlement was proved, and that was the foundation of this decree.

2. An account was decreed between the plaintiff and defendant; and it being proved, that the defendant had altered a bundle of papers; and it being likewiſe reported by the maſter, that he had ſuppreſſed the evidence; the Ld. Chan. diſallowed the defendant's whole demand, though he ſwore he had produced all the papers; and his lordſhip declared he was ſatisfied, that all the papers were produced *(a)*. *Wardour* and *Beresford*, *Paſc.* 1687. 1 *Vern.* 452. *(a) Max.* He that hath committed Iniquity ſhall not haveequity

3. The bill was to call the defendant, the plaintiff's ſteward, to an account; the defendant by way of plea inſiſted, that the plaintiff had ſued here, and alſo at law, for the ſame matter, and having her election, ſhe choſe to have her bill diſmiſſed here, and not meeting with ſucceſs at law, ſhe now reſorts back again to this court; that the plaintiff had ſeiſed in violent and undue manner all his writings and evidence, and likewiſe impriſoned his perſon: The court Vid. This caſe ſtated from the Regiſters book 2 Will Rep. 681—2.

court held, that a diſmiſſion upon an election was no more peremptory than a non-ſuit at law; and that as to the taking of the papers, tho' detinue of charters is a good plea at law to an account; yet to ſay that the plaintiff did once ſeize his writings, is not good; for it is the *Detainer* that makes the plea good; and as to the impriſonment, he may bring his action; and therefore ruled, that the defendant ſhould anſwer; but ordered, that whereas there was a conſiderable ſum of money in the trunk, that the money as well as writings ſhould be reſtored; for though the defendant may be greatly in the plaintiff's debt, yet ſhe muſt not levy her own debt after that manner. *The Counteſs of Plymouth* and *Bladon*, 2 *Vern.* 32

4. Though an account be ſtated under hand and ſeal, yet if there appears any miſtake in it, the court will order the parties to go to a new account. 3 *Chan. Rep.* 18. *Proud* and *Combes*, 15 *Nov.* 16 *Car.* 2.

5. The defendant's teſtator ſtated an account with the plaintiff, which was ſigned and ſealed by the parties; but the plaintiff afterwards finding that his ſervant had paid 200*l.* for which he had no credit given him, prayed a new account againſt the executor, who pleaded the former account ſtated, and that he was but an executor, and knew not how to account: The plea was over-ruled, but ordered to proceed no further than anſwer without leave of the court. 27 *Car.* 2. *Wright* and *Coxon*, 1 *Chan. Ca.* 262. *Rep. Temp. Finch* 431, S. P. in *Chandler* and *Dorſett*, 31 *Car.* 2. 2 *Chan. Ca.* 157, S. P. in *Oſborn* and *Chapman*, 35 *Car.* 2.

6. *A* makes a jointure of an equity of redemption, and afterwards becomes a bankrupt; the commiſſioners aſſign this equity of redemption, and the aſſignees ſtate an account. The jointreſs brings her bill to be relieved, alledging combination between the aſſignees and the mortgagee, and that they had allowed more money than was due on the mortgage. Ld. K. The aſſignees ſtand in the place of the huſband, and the account ſtated by them ought to be as concluſive, as if ſtated by the huſband; and the bill is not right in charging a general fraud in the ſtating of the account, but plaintiff ought to have aſſigned particular errors in the account; however the plaintiff had leave to amend her bill. *Knight* and *Bampfielf*, 1 *Vern.* 179.

7. Mortgagor and mortgagee ſettle an account before a maſter; and now a ſubſequent mortgagee ſues for a new account, ſuppoſing the former account to be falſe, and made by conſent, but did not inſiſt upon any particulars; and Ld. Chan. declared, that the account ſhould bind the ſecond mortgagee, if the fraud and colluſion were anſwered. *Trin.* 29 *Car.* 2. *Needler* and *Deeble*, 1 *Chan. Ca.* 299.

8. *A.* is tenant for life of a truſt, remainder to his ſons, *A.* before a ſon born brings a bill againſt the truſtees, and an account is decreed, and afterwards taken; this account ſhall bind the ſons, for all perſons that could be made parties were parties to the ſuit. *Leonard* and *Com. Suſſex*, *Mich.* 1705. 2 *Vern.* 526.

9. An account taken, and a diſtribution decreed in the ſpiritual court, of a perſonal eſtate; yet a new account decreed by Lord Chan. *Biſſell & Ux'* and *Axtell & al'*, *Eaſter* 1688. 2 *Vern.* 47.

10. The plaintiff's huſband and the defendant had dealings together as merchants; the bill was for an account; and although it was agreed that length of time was no bar, yet the plaintiff's huſband living many years after the trade and dealings between them ceaſed,

and

and acquiescing to the time of his death, the court dismissed the bill, and left the plaintiff to recover at law, if she could. *Sherman* and *Sherman, Mich.* 1692. 2 *Vern.* 276.

11. Among the merchants it is looked upon as an allowance of an account current, if the merchant who receives it does not object against it in a second or third post. *Per Hutchins,* Ld. Commiss. in the case of *Sherman* and *Sherman, Mich.* 1692. 2 *Vern.* 276.

CAP. III.

Affidavits.

(A) *Where an Affidavit is necessary,* & econt'.
(B) *Where an Affidavit may be said to be full and sufficient, and what shall be allowed thereon.*

(A) *Where an Affidavit is necessary,* & econt'.

1. IF a bill be exhibited, grounded on the loss of a bond; *per* Ld. K. As it is the loss which intitles the court to jurisdiction of the cause, affidavit must be made of it. *Trin.* 26 *Car.* 2. *Anon.* 1 *Chan. Ca.* 231.

2. But if a person comes only for a bare discovery of a deed, he need not make oath of the loss of it, as he must do when he comes for relief; for he cannot translate the jurisdiction without oath made of the loss of the deed. *Per* Ld. K. *Trin.* 1684. *Godfrey* and *Turner,* 1 *Vern.* 247.

3. So where a bill was brought for a bare discovery of a deed, and the defendant demurred, because the plaintiff had not made oath, according to the course of the court, that he had not the deed; upon which this distinction was taken and allowed of by the court; *viz.* That where a person comes for a discovery, and prays relief, there it is necessary for him to make affidavit of the want of the deed; but when he seeks but a bare discovery, or to have it produced at a trial, it is not necessary; for it is not to be presumed, that

that the plaintiff in either of the later caſes would do ſo abſurd a thing, as exhibit a bill, if he had the deed. 1 *Chan. Ca.* 11. 1 *Vern.* 180, S. P. But *vide* 1 *Vern.* 59. where the diſtinction is taken quite contrary, *but ſeems to be the miſtake of the reporter.*

4. The plaintiff had purchaſed the manor of *Leyborn* in the county of *Kent*, and the defendant was tenant of part thereof by a leaſe for years, which was now expired, at the rent of 80*l. per Annum*: and the plaintiff by his bill ſet forth, that the court-rolls, title-deeds, and writings belonging to this manor, were kept in a cloſet in ſuch a room at the chief manſion-houſe, and that after his purchaſe, the houſe being repairing, and workmen in the houſe, the defendant took that opportunity, and got into the cloſet, and took away all the writings, and (amongſt others) the counterpart of the defendant's leaſe, and charged that the defendant had broke ſeveral of the covenants in his leaſe; but that for want of the counterpart the plaintiff could not aſcertain his damages in an action at law to be brought concerning the ſame; and therefore prayed a diſcovery of this counterpart, and general relief. To this bill the defendant demurred to the relief only, for that the plaintiff had not annexed to his bill the uſual affidavit, that he had not the counterpart in his cuſtody, and gave a full anſwer, by way of diſcovery, to the whole bill; but the demurrer was over-ruled, for that the bill was only for a diſcovery, and therefore though he charged that ſeveral of the covenants were broken, yet he did not pray any recompence or ſatisfaction for ſuch breach, but only complained that for want of the counterpart he could not aſcertain his damages at law, ſo that he had wholly an eye to law for his ſatisfaction; and though he prayed relief generally, that was only to be applied to the particular relief he had before prayed, which was a diſcovery of the counterpart of the leaſe. *Trin.* 1729. *Whitworth* and *Goulding (a)*—S. P. As to the general relief being applied to a diſcovery, reſolved the ſame day between *King* and *King*.

(a) 2 *Will. Rep.* 541, S. C. There called *Whitchurch verſus Golding.*

5. A plea of privilege of an Univerſity need not be upon oath; but it is ſufficient to aver, that the party is a ſcholar reſident, *&c.* 26 *Car. 2. Prat* and *Taylor*, 1 *Chan. Ca.* 237. 1 *Chan. Ca.* 258, S. P.

6. A plea of outlawry need not be upon oath. 1 *Chan. Ca.* 237. 1 *Chan. Ca.* 258, S. P. But *Quære.*

7. For where the defendant pleaded the privilege of the Exchequer, being the foreign oppoſer, the plea was over-ruled, becauſe it was not put in upon oath. *Per* Ld. Chan. *Mich.* 1688. *Gibſon* and *Whiteacre*, 2 *Vern.* 83. So a plea of outlawry was diſallowed, becauſe it was not put in upon oath. *Hil.* 1688. *Parrot* and *Bowden*, 1 *Vern.* 37.

8. There was a reference to the ſix clerk, whether a plea of outlawry, with an averment of the ſame perſon, ought to be upon oath; and it was urged, that it had been ſo ruled in Lord *North*'s time, becauſe it might come from the other ſide, to aver that he was not the ſame perſon; and the court allowed the plea to be good, being only the common averment, but gave leave to amend on payment of 20*s.* coſt. *Mich.* 1690. *Took* and *Took*, 2 *Vern.* 198.

9. A plea of a former ſuit depending for the ſame matter, need not be upon oath. *Trin.* 1685. *Urlin* and ———, 1 *Vern.* 332.

10. When

10. Where a perſon is arreſted upon an attachment, the contempt ſhall hold good, though no affidavit be filed at the time of taking forth the attachment, if it be filed before the return of it. By Ld. K. *Trin.* 1683. 1 *Vern.* 172.

(B) *Where an Affidavit may be ſaid to be full and ſufficient, and what ſhall be allowed thereon.*

DECLARED by *Jefferies*, C. that a general affidavit of having material witneſſes beyond ſea ſhould not be ſufficient, but the witneſſes muſt be named in the Affidavit, and the point mentioned to which they can materially depoſe. *Mich.* 1685. 1 *Vern.* 334.

2. Some bailiffs, who had ſerved an execution in breach of an injunction, find money hid in the houſe, and carry it away, and the party, at whoſe ſuit the execution was taken out, was ordered to make ſatisfaction, who complained of this order as unjuſt, ſaying, that the parties ſhould be admitted to purge themſelves by oath; and that the plaintiff ſhould not be admitted to be judge of his own damages; but Ld. K. confirmed the order, and ſaid, that a man who had ſtolen would not ſtick to forſwear it; and that therefore, *in odium ſpoliatoris*, the oath of the party injured ſhould be a good charge on him who did the wrong. *Childrens* and *Saxby*, 25 *Car.* 2. 1 *Vern.* 207.

3. An accountant ſhall be allowed ſums under forty ſhillings on his own affidavit. *Mich.* 1684. *Anon.* 1 *Vern.* 283. *But ſee this vide Title* Account (B) *Pl.* 13 & 14.

CAP.

CAP. IV.

Agreements, Articles, and Covenants.

(A) *Agreements and Covenants which ought to be performed* in ſpecie, & econt'.
(B) *Parol agreements, or ſuch as are within the ſtatute of* Frauds *and* Perjuries, & econt'.
(C) *Voluntary agreements, in what caſes to be performed.*
(D) *Agreements, by whom to be performed.*
(E) *Concerning the manner and time of performing Agreements.*
(F) *Where the perſon or eſtate will be made liable to a Covenant or Agreement.*
(G) *Where there may be Relief when the Agreement is not ſtrictly performed.*

(A) *Agreements and Covenants which ought to be performed* in ſpecie, & econt'.

1. IF an uncle covenants, in conſideration of natural love, and in order to gain a reconciliation between his nephew and his father, (whom the nephew had diſobliged) to ſettle his eſtate on his nephew: Such covenant ſhall be executed *in ſpecie*; though it be objected, that a Court of Equity cannot decree the execution of a covenant or agreement *in ſpecie*, when the party has a remedy for damages at (a) law. *Wiſeman* and *Roper*,

(a) Prohibitions have formerly been granted to inferior Courts of Equity, for decreeing the performance of agreements *in ſpecie*; as where a man promiſed to make a leaſe, and refuſing, the Court of Marches of *Wales*, decreed a performance; and a prohibition was granted. 1 *Roll. Abr.* 280. *Lat.* 172. 1 *Roll. Rep.* 368. But now the power of Chancery and other Courts of Equity, in enforcing the execution of articles and agreements, is ſo well eſtabliſhed, that in many caſes, money agreed to be laid out in lands ſhall be conſidered as lands,

Roper, 21 *Car.* 1. 1 *Chan. Rep.* 158. An agreement decreed *in ſpecie*. 19 *Eliz. Cary* 84. and the like objection made.

lands, and lands as money; *vide*

1 *Chan. Ca.* 39. and though a loſing bargain will ſometimes be decreed, as well as a beneficial one, 2 *Vern.* 423. yet it muſt ever be obſerved, that articles or agreements, out of which an equity can be raiſed for a decree *in ſpecie*, ought to be obtained with all imaginable fairneſs, and without any mixture tending to ſurprize or circumvention; and that they be not extremely unreaſonable in any reſpect; otherwiſe a court of equity will, according to the circumſtance of the caſe, either ſet the agreement quite aſide, ſend the party to law, or direct a trial in a *Quantum damnificat'*.

2. *A.* having a leaſe from the Dean and Chapter of ——— ſells it to *B.* and it was agreed, that upon *A.*'s abating part of the money, *B.* ſhould, upon the King and the Dean and Chapter's reſtoration, reconvey it to *A.* and though it was objected, that this was in nature of a wager, and ſo more proper for a common law court; yet a ſpecifick performance of the agreement was decreed. By Maſter of the Rolls, 14 *Car.* 2. *Parker* and *Palmer*, 1 *Chan. Ca.* 42.

Upon an appeal to this decree it was affirmed by Ld. Chan. and *Bridgeman*, *ibid.*

3. *J. S.* upon a treaty of marriage, offered to ſettle 500*l. per annum* as a jointure on his intended wife, and was intruſted with the drawing of the ſettlement, which the wife never read, and the jointure ſettled was but 400*l. per annum*, and he taking notice during the marriage, that the jointure ſettled was not ſo much, and talking of making it up, but dying before, his heir was decreed to make it up, although there was no (*b*) covenant or agreement proved, by which he bound himſelf to make a jointure of that value. *Mich.* 1681. *Benſon* and *Bellaſis*, 1 *Vern.* 15, 17.

(*b*) There needs no great exactneſs in the words

which make a covenant; for where it appears to be the intent of two to do, or not to do a thing, it will be conſtrued a covenant, and the rather in equity, where a covenant is only conſidered as an evidence of an agreement, as a bond may be. *Vide* 1 *Chan. Ca.* 294.

4. A Feme ſole, being tenant in poſſeſſion, agrees with the heir at law, who pretended a title, that in caſe he did not diſturb her, ſhe would leave him the land after her death, if ſhe died without iſſue of her body, or 500*l.* in money; the Feme married, and deviſed to her huſband; and though it was urged, that this was all the portion the huſband had with her, and that he was therefore *quaſi* a purchaſer, and that ſhe being tenant in tail, might have docked the remainder; notwithſtanding Ld. Chan. decreed a performance of the agreement. *Paſc.* 1682. *Guilmore* and *Battiſon*, 1 *Vern.* 48.

5. If *A.* upon the marriage of his brother, executes a writing, by which he promiſes, if the wife be worth 160*l.* and if he dies without iſſue, he will give his lands to his brother and his heirs, and the wife is worth 160*l.* And *A.* himſelf afterwards marries and ſettles the lands in jointure upon his wife, and dies without iſſue, having deviſed the lands to his wife in fee, though this is urged to be a limitation to take effect after a dying without iſſue, and ſo ſubject to be deſtroyed by the tenant in tail, yet as the marriage was proved to be in expectation of the performance of this agreement, it will be good againſt the deviſee of the wife (*c*). Decreed 33 *Car.* 2. *Goylmer* and *Paddiſton*, 2 *Vent.* 353, 354.

(*c*) *Maxim*, Equity regards not the circumſtance, but the ſubſtance of the act: So note, an agreement in equity is better than a conveyance at law. *Max. of Eq.* 53, 54.

6. The plaintiff aſſigned ſome ſhares of the exciſe to the defendant, who thereupon covenanted to ſave him harmleſs, and to ſtand in his place touching all payments to the King; the plaintiff being ſued by the King brought his bill to have the agreement performed *in ſpecie*, and although it was inſiſted that the plaintiff might recover

1 Bac. Abr. 69.

damages at law; and that this was not a covenant for any thing certain; and that by this means a Maſter in Chancery was to tax damages inſtead of a Jury; yet it was decreed, that the defendant ſhould perform his covenants; and it was directed to a Maſter, that as often as any breach ſhould happen, he ſhould report it ſpecially, that the court, if occaſion ſhould be, might direct a trial in a *Quantum damnificat'* (*a*). *Mich.* 35 *Car.* 2. *Lord Ranelagh* and *Hayes*, 1 *Vern.* 189. 2 *Chan. Ca.* 146, S. C.

(*a*) Breach of covenants triable at law; for equity will not ſettle damages. *Stafford* and *Mayor of London*, 17 *March*, 1719. *In Dom' Proc'.*

1 Bac. Abr. 69. 70.

7. If *J. S.* a jointreſs, brings her bill to have an account of the real and perſonal eſtate of her late huſband, and to have ſatisfaction thereout for a defect of value of her jointure-lands, which he had covenanted to be and to continue of ſuch value; and the defendant inſiſts, that this is a covenant which ſounds only in damages, and properly determinable at law; tho' it be admitted, that a court of equity cannot regularly aſſeſs damages; yet in this caſe a Maſter in Chancery may properly inquire into the value and defect of the lands, and report it to the court, which may decree ſuch defect to be made good, or ſend it to be tried at law upon a *Quantum damnificat'*. *Mich.* 1699. *Hedges* and *Everard.*

1 Bac. Abr. 70.

8. The condition of a bond was to ſettle certain lands in ſuch a manor by ſuch a day; the obligor dies before the day, ſo the bond was ſaved at law; and the queſtion was, Whether this court would decree an execution *in ſpecie*: *Per* Ld. Chan. the lands muſt be ſettled, and ſo it has often been done. *Paſc.* 1697. *Holtham* and *Ryland.*

9. By a marriage-agreement, which was reduced into writing, but not ſealed, the ſon's intended wife was to have more than would have been left for the father, (indebted) his wife and two daughters unpreferred; and the court would not decree it, principally by reaſon of the extremity of it, but left the party to his remedy at law (*b*). 31 *Car.* 2. *Anon.* 2 *Chan. Ca.* 17.

(*b*) Here the agreement was not fraudulent, or gained by ſurprize, and therefore not to be ſet aſide; the court not being willing to decree the whole, and not being able to decree part, (for a court of equity cannot aſſeſs damages) it muſt neceſſarily go to law. *Max. of Eq.* p. 6. in the note.

10. If *A.* articles for the purchaſe of *B.*'s eſtate, pretending he bought it for one whom *B.* was willing to oblige, and thereby gets it ſomewhat the cheaper, when in truth he bought it for another, equity will not decree an execution of this agreement. *Hil.* 1682. *Philips* and *The Duke of Bucks*, 1 *Vern.* 227.

Prec. in Chan. 138, S. C. See alſo 2 *Freem.* 245.

11. *A.* on the marriage of his daughter to *B.* covenants that *B.* ſhall have his lands called *C.* at his death, cheaper than any other perſon, and lives twenty years after, and deviſes to *B.* 1000*l.* and to his daughter, *B.*'s wife, 500*l.* and deviſes the lands to his grandſon; the court refuſed to decree an execution of the agreement, becauſe of the uncertainty of it; and it not being mutual, *B.* not being bound to take it at any price. *Hil.* 1700. *Bromley* and *Jefferies*, 2 *Vern.* 415.

12. An agreement for a purchaſe being obtained by an attorney from an old woman of ninety, and ſeveral ſuſpicious circumſtances appearing, Ld. Chan. would neither decree it to be carried into execution againſt the heir at law, nor to be delivered up upon a croſs bill exhibited for that purpoſe. *Hil.* 1708. *Green* and *Wood*, 2 *Vern.* 632.

(B) *Parol Agreements, or ſuch as are within the Statute of* Frauds *and* Perjuries, & econt'.

Vid. for this head. 1 Bac. Abr. 73, 74, &c.

1. A Bill was brought to have the execution of a parol agreement for a leaſe of a houſe, ſetting forth, that the plaintiff, in confidence of this agreement, had expended large ſums of money in repairs, &c. to which the defendant pleaded the (*a*) ſtatute of *Frauds* and *Perjuries*, and the plea was allowed. But Ld. K. was of opinion, that if it had been laid in the bill to be part of the agreement, that it ſhould be put into writing, it might have altered the caſe, and poſſibly require an anſwer. *Hil.* 1682. *Hollis* and *Whiteing*, 1 *Vern.* 151.

(*a*) By the 29 *Car.* 2. *c.* 3. all eſtates, intereſts of freehold, or terms for years, or any uncertain intereſt in or out of lands, &c. not put in writing, and ſigned by the parties making them, or their agents authorized by writing, ſhall have no greater effect than as eſtates at will, except leaſes not exceeding three years, from the making whereof the rent reſerved ſhall be two thirds of the full value of the thing demiſed.

2. Bills were to have an execution of parol agreements touching leaſes of houſes, ſetting forth, that in confidence of theſe agreements plaintiffs had expended great ſums about the premiſſes; and it was alledged, that it was agreed, that the agreements ſhould be reduced into writing. Defendant pleaded the ſtatute of *Frauds*. Ld. K. ſaid, that the difficulty was, that the act makes void the eſtate, but does not ſay, that the agreement itſelf ſhall be void; and therefore he thought, that if that ſubſiſted, ſo as to intitle the party to damages at law, it might be (*b*) decreed in equity, and directed that point to be tried, and that afterwards he would conſider farther of it; but as to the improvements made, his Lordſhip was clear of opinion, that for ſuch as were for uſe and neceſſity, and not merely for humour and fancy, the party was to have ſatisfaction. *Eaſter* 1683. *Hollis* and *Edwards & al'*. *Deane* and *Izard*, 1 *Vern.* 159.

(*b*) As the ſtatute of Frauds and Perjuries was made with a deſign to prevent, either in marriage, or any other treaties, incertainty, perjury, or contrariety of evidence, ſeveral caſes not liable to theſe inconveniences have been determined to be out of the ſtatute, upon the following diſtinctions, which ſeem the more neceſſary to be mentioned, as many of the printed caſes on this ſubject take no notice of them; and by not giving us all the circumſtances of the caſe, frequently contradict each other; it may likewiſe be proper to inſert the caſes themſelves, which ſupport theſe diſtinctions.

3. *1ſt, That tho' the agreement be by parol, and in no part executed, yet if there be no incertainty, the court will decree it:* As if a bill be brought for a ſpecifick performance of an agreement, and the ſubſtance of the agreement is ſet forth in the bill, and confeſſed by the defendant's anſwer, the court will decree execution of it; for in this caſe there is no danger of perjury, which was the only thing the ſtatute intended to prevent. *Mich.* 1702. *Croyſton* and *Banes*. *Mich.* 1713, S. P. *Simondſon* and *Tweed*.

Prec. in Chan. 208, S. C. Gilb. Equ. Rep. 35. S. P. Mick. 10. Ann. 2 Equ. Abr. 47. pl. 15. S. P.

4. *2dly, That tho' the agreement be by parol, yet if it be agreed to be reduced into writing, and part of the agreement is executed, but the reducing of it into writing is prevented by fraud, it may be good.* As if upon a marriage-treaty, inſtructions are given by the huſband to draw a ſettlement, and by him privately countermanded, and afterwards he draws in the woman, by perſuaſions and aſſurances of ſuch ſettlement, to marry him, this ſhall be executed. *Mich.* 1719. *Sir George Maxwell* and *Lady Montacute's* caſe.

Prec. in Chan. 526. and 1 *Will. Rep.* 618, S. C.

5. So where a parol agreement was concerning the lending of money on a mortgage, and the conveyance propoſed was an abſolute deed from the mortgagor, and a deed of defeaſance from the mortgagee; and after the mortgagee had got the deed of conveyance, he refuſed to execute the defeaſance; yet it was decreed againſt him on the fraud, by Lord *Nottingham*, ſoon after the making the ſtatute, a caſe quoted and agreed to, in *Sir George Maxwell's* caſe. *Mich.* 1719.

Vid. 2 Equ. Abr. 42. pl. 9.

6. 3*dly*, *When the agreement is ſigned but by one party, yet it may be decreed on the circumſtances of fraud*; as where the defendant, on a treaty of marriage for his daughter with the plaintiff, ſigned a writing comprizing the terms of the agreement; and afterwards deſigning to elude the force thereof, and get looſe from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which ſhe accordingly did; and the defendant ſtood by at a corner of a ſtreet to ſee them go by to be married; and the plaintiff was relieved by the Maſter of the Rolls upon the point of fraud, which was proved.

(*a*) Pag. 21. caſ. 3.

Cited to be adjudged, by Ld. Chan. in the caſe of (*a*) *Bawdes* and *Amburſt*, *Paſc.* 1715. *Mallet* and *Halfpenny*, *Hil.* 1699. 2 *Vern.* 373, S. C. reported by the name of *Halfpenny* and *Ballet*; but no mention made of any fraud, but that the father having permitted plaintiff to court his daughter, and the marriage being afterwards had, and he not declaring his diſlike till aſked for payment of the portion, and permitting the young couple to live with him; the Maſter of the Rolls decreed the agreement, and payment of the portion.

7. The defendant's ſon made his addreſſes to the plaintiff's daughter, and the plaintiff deſiring to know what the father could ſettle on him, he told him, that his father had an eſtate of 60*l. per ann.* that he was in a good trade, and would take him in partner; and ſaid he would ſatisfy him more particularly by going to his father, who lived at ſome diſtance off, and accordingly went, and on his return told him, that he would ſettle the eſtate on him, and take him in partner; upon which the plaintiff agreed to ſettle a leaſehold eſtate on him of 2 or 300*l. per ann.* but deſired the ſon to acquaint his father of it by letter, who did, and the father, in his anſwer, expreſſed his good-liking of the match, and ſaid he would comply with every thing he told his ſon. On the marriage-day the woman fell ſick of the ſmall-pox, and the ſame day the ſon went to his father's, where he fell ſick likewiſe of the ſmall-pox, but in his ſickneſs was prevailed on to make a will, and deviſe the leaſehold eſtate to his father, and died; the wife recovering, her father and ſhe pray a reconveyance of the leaſehold eſtate, or that the agreement might be performed *in ſpecie*, and a diſcovery of the letter wrote by the ſon, and inſiſted, that the letter and anſwer brought the agreement out of the ſtatute of *frauds*; but the defendant denying that he knew the contents of the letter, though he owned he received ſuch a one, and that he had burnt it as waſte-paper, Ld. Chan. (though he ſaid it was a caſe of great compaſſion) doubted whether he could relieve the plaintiffs, ſaying, It was only executed according to the ſtatute, by one party, and what the defendant told his ſon might be very uncertain, who perhaps might have magnified matters, in order to enhance his father-in-law's good eſteem of him; but he gave the parties time to ſee if they could agree the matter. *Hil.* 1710. *Hall* and *Butler*.

8. On

8. On a marriage-treaty, the lady's father propoſed to give 4500*l.* portion, and the huſband was to ſettle 4 or 500*l.* *per ann.* for a jointure; the father and intended huſband went to Mr. *Minſhull*'s chambers, who hearing the propoſals on both ſides, took down minutes or heads thereof in writing; and the ſame day gave them to his clerk, to draw a ſettlement according to the terms of the agreement; the next day the father fell ſick ſuddenly, and died in two hours after, and the next morning the marriage was conſummated; and on a bill brought to have a ſpecifick performance of the agreement, Ld. Chan. decreed it to be within the ſtatute of *frauds*, and ſaid, he knew no caſe where an agreement, though wrote by the party himſelf, ſhould bind, if not ſigned, or in part executed by him; and that thoſe preparatory heads might have received ſeveral alterations or additions, or the agreement might have intirely broke off upon ſome further inquiry of the party's circumſtances; and this decree was thought very juſt by the Bar, who all agreed with my Lord Chancellor, That if the marriage had been had upon the foot of this writing, and the father had been privy and conſenting to it, that he ſhould afterwards have been obliged to execute his part thereof. *Paſc.* 1715. *Bawdes* and *Amburſt*. *Prec. in Chan.* 402, S. C. Gilb. Chanc. 256-7. S. C.

9. If *A.* agrees to ſell the lands in queſtion to *B.* and a ſhort note is drawn of the agreement, (but not ſigned by either party) purporting, among other things, that *B.* ſhould have the lands from *Lady-day* next, and that he ſhould then pay the purchaſe-money, and poſſeſſion is delivered *B.* who thereupon puts in his cattle, and makes incroachments on *A.*'s other lands, by which ſome differences aroſe, which to remove, *A.* deſires *B.* to repeal the bargain, which he refuſed; upon which *A.* ſells the lands to *C.* who had notice; *B.* having tendered the money and conveyances the 26th of *March* following, he will be decreed the lands, this agreement being in part executed, and therefore not within the ſtatute. *Hil.* 1685. *Butcher* and *Stapely*, 1 *Vern.* 363. 2 *Vern.* 455, S. C. cited in a caſe where an agreement, though not ſigned, yet being in part executed, was decreed. *Pyke* and *Williams*.

10. *A.* ſold houſes to *B.* for 2000*l.* a note was made by *A.* of the agreement, and ſigned by *B.* only; and it was objected, that this was within the ſtatute, and that the note binds not him who did not ſign it; and that they muſt be both or neither bound in equity; but it was decreed that they were both bound. 36 *Car.* 2. *Hatton* and *Gray*, 2 *Chan. Ca.* 164.

11. *A.* agreed by parol with *B.* for a leaſe, which was drawn, peruſed, and corrected by *A.*'s counſel, and afterwards engroſſed; *B.* ſigned the leaſe, *A.* having pleaded the ſtatute: The court ordered him to anſwer, but ſaved the benefit of the plea till the hearing. *Hil.* 1683. *Lowther* and *Carril*, 1 *Vern.* 221.

12. An adminiſtratrix, and her two children, being intitled to a leaſe of a houſe, they all agree to make a leaſe to *J. S.* for ten years, and the adminiſtratrix alone, with the privity of the other two, executes the leaſe; and it was held, that this was out of the ſtatute, and the leaſe good. *Mich.* 1683. *Heighter* and *Sturman*, 1 *Vern.* 210.

13. *A.* and *B.* being joint-leſſees of a building-leaſe, *A.* by parol agrees to ſell his intereſt to *B.* for four guineas, and accepts a pair

of

of compaſſes in hand to bind the bargain; *A.* having pleaded the ſtatute of *frauds*, Ld. Chan. ordered him to anſwer, the agreement being in part executed, but ſaved the benefit of the plea to the hearing. *Mich.* 1687. *Alſopp* and *Patten*, 1 *Vern.* 472, 473.

14. But where *A.* and *B.* being ſeverally in treaty to purchaſe houſe and toft of ground of *J. S.* they agree by parol, that *A.* ſhall deſiſt, and that *B.* ſhall purchaſe, and let *A.* have part of the ground, which he wanted, at a proportionable price; *B.* purchaſes, but refuſes to perform the agreement; and it was held by the Maſter of the Rolls, that this was out of the ſtatute, being in part executed by *A.*'s deſiſting; but upon an appeal Ld. Chan. held it within the proviſion of the act, and reverſed the decree. *Mich.* 1708. *Lamas* and *Bayly*, 2 *Vern.* 627.

15. The ſingle point of a caſe was, Whether an agreement in writing could be diſcharged by parol; and Ld. K. *North* held it might, and diſmiſſed the bill, which was brought to have it executed *in ſpecie*. *Paſc.* 1684. *Gorman* and *Saliſbury*, 1 *Vern.* 240.

16. *A.* wrote a letter, ſignifying his aſſent to the marriage of his daughter with *J. S.* and that he would give her 1500*l.* and afterwards, by another letter, upon a further treaty concerning the marriage, he went back from the propoſals of his firſt letter; but in ſome time after declared, that he would agree to what was propoſed in his firſt letter: This letter was held a ſufficient promiſe in writing, and not within the (*a*) ſtatute of *frauds* and *perjuries*, 35 *Car.* 2. *Bird* and *Bloſſe*, 2 *Vent.* 361. and that the laſt declaration had ſet up the terms of the firſt letter again; *vide* 1 *Vern.* 110. *Mich.* 1682. in *Moore* and *Hart*, where a letter wrote by a father, promiſing a portion, and he conſenting, held out of the ſtatute.

(*a*) By the 29 *Car.* 2. *c.* 3. no action ſhall be brought to charge any perſon on any agreement or conſideration of a marriage, unleſs the agreement, upon which ſuch action ſhall be brought, or ſome memorandum or note thereof, ſhall be in writing, ſigned by the party to be charged therewith, or ſome other perſon authorized by him.

17. On a bill for a marriage-portion, the chief evidence to ſupport it was a letter proved to have been written by the father's direction, wherein it was ſaid he would give 1500*l.* portion with his daughter, and that he was afterwards privy to the marriage, and ſeemed to approve of it; and the portion was decreed the huſband, who had taken out adminiſtration to his wife; and this decree affirmed in the Houſe of Lords. *Mich.* 1694. *Wankford* and *Fotherby* (*b*), 2 *Vern.* 322.

(*b*) 2 *Freem.* 201, L. C. and decree under the name of *Wanchford* and *Fotherley*; and this Reporter ſays, that Lord Keeper cited two caſes, one of *Hart* and *More*, where a portion was decreed upon a letter writ, and another of *Maſquill*, &c. where writings were prepared and agreed, but being blotted, were ordered to be writ fair, and were ſo; but before they were ſealed the party died, and equity charged the executor with the portion agreed to be paid. *Ibid.* 202.

18. On a treaty of marriage between the plaintiff and the defendant's daughter, a meeting was appointed, and an agreement drawn up in writing, but ſigned by neither party; and the defendant ſwore, that though it was drawn up in writing, yet upon ſome diſputes and difficulties ariſing afterwards, it broke off; but one witneſs ſwore, that after it was writ, it was read to the parties, and approved of by them; afterwards the plaintiff married the defendant's daughter, with his conſent and privity, who ſeemed ſo well pleaſed, that he helped to ſet them forward in the morning,

Vid. etiam 2 *Vern.* 34. where this cauſe firſt came before the court, and the chief ſupport of the plaintiff ſeemed to reſt on a letter written by the defendant, though this unfiniſhed agreement is alſo there mentioned.

and

and entertained them at his houſe; and he was decreed to perform the agreement. *Hil.* 1690. *Cookes* and *Maſcall*, 2 *Vern.* 200, 201.

19. But where *A.* by letter under his hand promiſed 1000*l.* to his niece, but in the ſame letter diſſuaded her from marrying the plaintiff, but afterwards was preſent at, and gave her in marriage; yet the court would not decree the payment of the 1000*l.* but left the plaintiff to his action at law. *Hil.* 1690. *Douglas* and *Vincent*, 2 *Vern.* 202.

20. *A.* and *B.* agree, that *B.* ſhall aſſign a term for years in his houſe and plate, and certain veſſels of beer, for 200 guineas, whereof one was paid in hand as earneſt of the bargain, and three days after 19 guineas more; and part of the agreement was, that it ſhould be executed by writing at a certain time: Upon a bill for a ſpecifick performance of the agreement *B.* pleaded the (*a*) ſtatute of *frauds*, and inſiſted, that no part of the things being delivered, there was no execution, and that the 20 guineas were delivered for the leaſe; but Ld. K. over-ruled the plea. *Hil.* 34 & 35 *Car.* 2, *Leak* and *Morrice*, 2 *Chan. Ca.* 135.

(*a*) By the 29 *Car.* 2. *c.* 3. no contract for the ſale of goods, for ten pounds or upwards, ſhall be good, except the buyer actually receives part of the goods ſold, or gives ſomething in earneſt to bind the bargain, or in part of payment, or ſome note thereof in writing be made and ſigned by the party to be charged with the contract, or their agents thereunto lawfully authorized; and no action is to be brought upon any agreement, that is not to be performed within the ſpace of a year from the making the ſaid agreement, unleſs the agreement upon which ſuch action ſhall be brought, ſhall be put in writing, and ſigned by the party to be charged therewith.

(C) *Voluntary Agreements, in what Caſes to be performed.*

1. IF there are two (*b*) voluntary deeds or conveyances of the ſame eſtate, the firſt ſhall prevail. *Goodwin* and *Goodwin*, 1658. 1 *Chan. Rep.* 173.

(*b*) Tho' voluntary agreements and conveyances are regularly good, ſo as to bind the parties themſelves, if they are not attended with badges of fraud or circumvention; yet it has been always held diſcretionary in courts of equity, whether they would interpoſe, either in aiding or ſetting them aſide; but if they affect creditors, purchaſers, or even younger children, a court of equity will interpoſe.

2. If *A.* makes a voluntary ſettlement of his eſtate, without any power of revocation, and afterwards deviſes it, the deviſee being a volunteer, ſhall have no aid againſt the ſettlement; for to relieve in ſuch a caſe, would be to eſtabliſh it as a maxim, *That no man can make any voluntary diſpoſition of his eſtate, but by his will only*, which would be abſurd. *Per* Ld. Chan. *Mich.* 1682. *Villars* and *Beaumont*, 1 *Vern.* 100, 101.

3. So where *A.* conveyed his lands to the uſe of himſelf for life, remainder, as to a third part, to his wife for a jointure, remainder of the whole to his infant heir in tail, and two days afterwards makes his will, and deviſes the ſame eſtate with other things, to his infant heir in tail, but ſubject to the payment of debts, in caſe his perſonal eſtate ſhould not be ſufficient, and alſo a legacy of 250*l.* The perſonal eſtate proving deficient, on a bill brought to have the debts paid out of the lands, that the legacy may be charged on the perſonal eſtate, it was held by the court, that the ſettlement, though voluntary, yet it was not revocable, and therefore the teſtator was diſabled to charge the lands by his will. *Trin.* 1687. *Bale* and *Newton*, 1 *Vern.* 464.

4. *A.* ſeiſed in tail of freehold lands, and in fee of copyhold lands, deviſed the copyhold lands to the defendant, who was intitled to the remainder of the freehold lands, and deviſed the freehold lands to the plaintiff; the defendant apprehending there had been a recovery ſuffered by the teſtator, agreed with the plaintiff, without any conſideration, that each of them ſhould enjoy the lands according to the will; but diſcovering afterwards that there had been no recovery ſuffered, he brought his action to recover his freehold lands; and the plaintiff brought a bill to eſtabliſh the agreement; which was decreed accordingly. *Frank* and *Frank*, 1 *Chan. Ca.* 84.

1 Bac. Abr. 71. 5. If a man makes a voluntary conveyance, and there be a defect in it, ſo as it cannot operate at law, equity will not decree an execution thereof; but in ſome caſes it will be decreed, if intended as a proviſion for younger children, In a note at the end of *Bonham* and *Newcomb*, 2 *Vent.* 365. 2 *Vern.* 40, S. P.

Prec. in Chan. 235, S. C. 6. A father makes a voluntary ſettlement on his eldeſt ſon and his heirs, without any power of revocation; afterwards he makes a ſettlement on his ſecond ſon for life, with remainder to his firſt and other ſons in tail, and dies; the firſt deed came to the hands of the eldeſt ſon's heir, and the other to the ſecond ſon, who brought a bill to ſet aſide the firſt; but both ſons having been otherwiſe provided for, it was held by Ld. Chan. that though both deeds were voluntary, yet the conſideration of being a younger child was not ſufficient to ſet aſide the firſt. *Clavering* and *Clavering*, *Hil.* 1704. *Vide* 2 *Vern.* 475, S. C. differently ſtated, and ſeveral caſes there put to this purpoſe.

1 Bac. Abr. 71. 7. If an annuity is granted by one to his houſe-keeper, with a bond for payment of it, and the bond is loſt, equity will decree payment of the annuity, for ſervice is a conſideration, and no *turpis contractus* ſhall be preſumed, unleſs proved. *Lightbone* and *Weeden*, *Hil.* 1700.

(D) *Agreements, by whom to be performed.*

1. IF *A.* by writing, agrees with *B.* and *C.* to pave the ſtreets in a pariſh, and they, in behalf of the pariſh, agree to pay him for it, and this writing is lodged in the hands of *B.* if *A.* paves the ſtreets, he muſt have relief againſt the undertakers, eſpecially in this caſe; the written agreement, which is his evidence, being in the hands of one of them; and the undertakers muſt take their remedy againſt the reſt of the pariſh. *Mich.* 13 *Car.* 2. *Meriel* and *Wymondſall*, *Hard.* 205.

2. If fifteen of the tenants of a manor agree to incloſe a common, and it appears that there are eighteen who have right of commonage; yet an incloſure will be decreed, though oppoſed by three, for it ſhall not be in the power of two or three wilful perſons to oppoſe a public good. *Anon.* 6 *Nov.* 15 *Car.* 2. *per* Ld. Chan. and Maſter of the Rolls, 3 *Chan. Rep.* 13, 14.

3. So if the agreement be to ſtint a common, it ſhall be decreed, though oppoſed by two or three humourſome tenants. *Trin.* 1689. *Delabeere* and *Beddingfield*, 2 *Vern.* 103. where it is ſaid, that a ſtint is more to be favoured than an incloſure. By Lds. Commiſſ.

4. If

4. If tenant in tail, for valuable conſideration, agrees to convey, he may be compelled in equity to execute the agreement; but if he dies, his iſſue is not bound thereby, unleſs he doth ſome act whereby he conſents to and confirms the agreement. *Trin.* 22 *Car.* 2. *Roſs* and *Roſs*, 1 *Chan. Ca.* 171, 1 *Lev.* 239, S. P. Though there was a decree, and the father ſtood out all the proceſſes of contempt. *Powel* and *Powel*, *Hil.* 1708. So though the father died in priſon, and in contempt for not performing the decree, yet the iſſue was not bound. *Fox* and *Crane & al'*, *Mich.* 1693. 2 *Vern.* 304, 306. But for this *vide* by what acts of the anceſtor the heir ſhall be bound, *Title Heir*. 1 Bac. Abr. 68.

5. If a copyholder for life, where by the cuſtom there is a widow's eſtate, agrees to ſell his eſtate, and dies; his widow is no more bound by the agreement, than one jointenant is by an agreement to ſell by the other. Bill diſmiſſed with coſts (*a*) *Paſc.* 1688. *Muſgrave* and *Daſhwood*, 2 *Vern.* 63.

(*a*) For if ſuch contracts for copyholds ſhould be decreed, all Lords would be defrauded of their fines, &c. *Ibid*

6. If a feme covert, by agreement made with her huſband, is to ſurrender or levy a fine, though the huſband die before it be done, the court will compel the woman to perform the agreement, *Baker* and *Child*, 2 *Vern.* 61. 1 Bac. Abr. 68 in marg.

7. The plaintiff's father applied himſelf to the defendant *H.* a ſcrivener, to borrow 200*l.* who accordingly procured the money, and the plaintiff and his father entered into bonds for the payment of it to *B.* and *C.* the plaintiff's father became afterwards inſolvent, and he himſelf alſo, by reaſon of the debts for which he ſtood engaged for his father: The father having compounded with his other creditors for ſeven ſhillings in the pound, the plaintiff and his father applied themſelves to the defendant, to know where *B.* and *C.* lived, who, inſtead of informing them, told them that they would ſtand to any thing he did; upon which they compounded with him for 10*s.* in the pound, 70*l.* to be paid immediately, which was done, and 30*l.* at a day afterwards, which was tendered; and now the plaintiff prays that the bonds may be cancelled, and that he may be indemnified; and it was decreed that the plaintiff ſhould pay *B.* and *C.* their whole money, they not being privy to the agreement, and that *H.* though he acted as an agent, ſhould repay him, and indemnify him, according to the agreement. *Hil.* 1690. *Parrot* and *Wells*, 2 *Vern*, 127.

8. If *A.* articles on behalf of *B*, to purchaſe four houſes in *Jamaica*, and to pay 800*l.* for the ſame, and pending a ſuit to compel the ſeller to make out a good title, the houſes are ſwallowed up by an earthquake, yet *A.* ſhall pay the 800*l.* though he has not ſufficient effects of *B.*'s in his hands. Decreed, and afterwards affirmed in the Houſe of Lords. *Caſs* and *Rudell*, 2 *Vern.* 280.

(E) *Concerning the Manner and Time of performing Agreements.*

1. IF an agreement be to quit the poſſeſſion of lands, the court will not decree a conveyance of the lands themſelves; but if the agreement was to convey lands, the court would have decreed the agreement, though the party was not apprized what eſtate he had in the lands. *Per* Ld. K. *Hil.* 1682. *Gerard* and *Vaux*, 1 *Vern.* 121.

2. If

2. If a bill be brought to have a covenant decreed *in ſpecie*, whereby the plaintiff was to have a pit in the defendant's ground for digging of black ſtone, and that when the old one failed, he might ſink a new pit; and with a farther covenant, that there ſhould be no other pit there; and it appears in the cauſe, that the defendant, and thoſe under whom he claims, had been in poſſeſſion of a pit there, and had uſed the ſame for above ſixty years paſt; the court, inſtead of decreeing the covenant *in ſpecie*, will diſmiſs the bill. *Hil.* 1690. *Scolefield* and *Whitehead*, 2 *Vern.* 127.

3. If *A.* articles to ſell lands to *B.* (who was his agent, and greatly intruſted by him in the management of his eſtate) for 15000*l.* the whole money to be paid, or ſo much land returned as would make up what he paid ſhort of the 15000*l.* and *A.* conveys part of the lands to *B.* and by his perſuaſion values that part at an under-value, alledging it was not material to mention the very ſum, in regard he was to make up the whole 15000*l.* and then *B.* ſells this part to *C.* and then would have returned ſo much of the reſt as would make up the 15000*l.* tho' the ſale to *C.* ſhall ſtand, yet the articles ſhall be ſet aſide as unreaſonable; and the rather, becauſe *B.* had not paid the money, or returned the value in lands, according to the time prefixed. Decreed, and affirmed in the Houſe of Lords. *Mich.* 1690. *Broom Whorwood* and *Simpſon*, 2 *Vern.* 186.

4. If one is bound to transfer 300*l.* *Eaſt-India* ſtock before ſuch a time, which he neglects to do, and the ſtock is much riſen, he was decreed to transfer the ſtock *in ſpecie*, and to account for all dividends from the time that it ought to have been transferred. *Mich.* 1700. *Gardner* and *Pullen*, 2 *Vern.* 394.

Vid. 3 Will. Rep. 225-6, where this caſe is examined.

5. If *A.* covenants on his marriage to purchaſe lands of 200*l.* a year, and ſettle them for the jointure of his wife, and to the firſt, *&c.* ſons of the marriage; and he purchaſes lands of that value, but makes no ſettlement; and on his death the lands deſcend on his eldeſt ſon; if the ſon brings a bill for a ſpecifick performance of the agreement, the lands deſcended will be decreed a ſatisfaction of the covenant. *Trin.* 1706. *Wilcocks* and *Wilcocks*, 2 *Vern.* 558.

(F) *Where the Perſon or Eſtate will be made liable to a Covenant or Agreement.*

1. IF a man hath lands ſubject to the payment of a rent-charge, and grants part of the lands to *B.* and covenants that that part ſhould be diſcharged of the rent; yet this is not ſuch a real covenant, that ſhall run with the land, and charge the other lands with the whole; but it is only a perſonal covenant, which muſt charge the heir only in reſpect of aſſets (*a*). *Mich.* 1656. *Cook* and *Arundel*, *Hard.* 87. decreed *in Scaccario*.

(*a*) 1 *Chan. Ca.* 212. C. P. decreed *cont'* in the caſe of *Lord and Lady Cornbury* and *Middleton & al'*, *Trin.* 23 *Car.* 2. by Ld. Keeper, *Wyld* J. and B. *Windham*.

2. A purchaſer of the crown-lands, in the time of the late wars, ſells part to the plaintiff, and covenants to make further aſſurance, and he on the King's reſtoration had a leaſe for years made to him under the King's title; and he was decreed to aſſign his term in the part he ſold. *Hil.* 27 *Car.* 2. *Taylor* and *Debar*, 1 *Chan. Ca.* 274. 2 *Chan. Ca.* 212, S. C. *in totidem Verbis*.

3. If

3. If a man covenants to ſettle lands, or an annuity out of lands, and he afterwards purchaſes lands, having no lands before, and deviſes it, and dies, this purchaſed land ſhall, notwithſtanding, be liable to the covenant. *Paſc.* 1689. *Tooke* and *Haſtings*, 2 *Vern.* 97.

4. *A.* and *K.* his wife, being ſeiſed in right of the ſaid *K.* of two pieces of ground, by indenture, 25 *January* 1622, did grant a watercourſe to one *J. H.* and his heirs, through the ſaid two pieces of ground; and by the deed did covenant for them, their heirs and aſſigns, from time to time, to cleanſe the ſame, and that all fines and recoveries levied and ſuffered, or to be levied or ſuffered, of the ſaid grounds, ſhould be and enure to the ſtrengthening and confirming the ſaid watercourſe, according to the ſaid grant; and afterwards a recovery was had, and a deed executed, declaring the uſes to be as aforeſaid; the watercourſe by meſne aſſignments came to the plaintiff, and the ſaid two pieces of ground to the defendant, who built on the ſame, and much heightened the ground which lay over the ſaid watercourſe, and made it much more chargeable and inconvenient to repair; and as it was alledged (and in part proved) the building had much obſtructed the ſaid watercourſe; ſo the bill was for eſtabliſhing the enjoyment of the ſaid watercourſe, and that the defendant, and all claiming under him, might from time to time cleanſe the ſame, according to the covenant: It was objected, that the ſaid covenant being a perſonal covenant, was not at all ſtrengthened by the recovery, and that the plaintiff, and thoſe under whom he claimed, being ſenſible of it, had for forty years cleanſed the ſame at their own charges: But the court was of opinion, that this was a covenant which run with the land, and made good by the recovery; and that though the plaintiff had cleanſed the ſame at his own charge, whilſt it was eaſy to be done, and of little charge; yet ſince the right was plain upon the deed, and the cleanſing made chargeable by the building, it was reaſonable the defendant ſhould do it; and decreed accordingly, and gave the plaintiff his coſts. *Hil.* 1691. *Holmes* and *Buckley*. *Prec. in Chan.* 39, S. C. *in totidem Verbis.*

(G) *Where there may be Relief when the Agreement is not ſtrictly performed.*

1. *J. S.* having purchaſed church-lands in fee, under the title of the uſurper, ſold the ſame to the defendant's teſtator, and covenanted that he was lawfully ſeiſed, *&c.* the church being reſtored, and the eſtate made void, *J. S.* was relieved againſt this covenant; there being ſome proof, that at the time of ſealing, the plaintiff, *J. S.* declared he undertook for his own act only. Ld. Chan. and Maſter of the Roſs, *Mich.* 14 *Car.* 2. *Dr. Caldcot* and *Hill*, 1 *Chan. Ca.* 15. and a like caſe of *Farrer* and *Farrer*, ſaid to have been decreed about ſix months before.

2. *A.* ſells to *B.* with covenants only againſt *A.* and all claiming by, from or under him; *B.* ſecured the purchaſe-money; but before the payment the land was evicted, but not by any title under *A.* but by a title paramount; *B.* ſued to be relieved, that he might not be forced to pay, ſeeing the land was loſt, and was relieved. By Ld. Chan. *Anon.* 31. *Car.* 2. *Chan. Ca.* 19. reported *ex relatione Churchill.*

3. If a creditor agrees with his debtor to take leſs than his debt, ſo that it be paid preciſely at ſuch a day, and the debtor fails of payment, he cannot be relieved; for *per* Ld. K. *Cujus eſt dare ejus eſt diſponere. Mich.* 1683, *Sewel* and *Muſſon*, 1 *Vern.* 210. 1 *Chan. Ca.* 110, S. P. *arguendo.*

4. If money be lent on a mortgage at 5 *per cent.* and the mortgagor covenants to pay 6 *per cent*, if he made default for the ſpace of ſixty days after the time of payment; if he makes default, the court will not relieve, this being the agreement of the parties. *Hil.* 1690. *Lord Hallifax* and *Higgins*, 2 *Vern.* 134.

Vid. aut. 2 Vern. 289, 290, and 316. 2 Eq. Abr. 611. pl. 3.

5. If a leſſee for a long term of years covenants to lay out 200*l.* upon the premiſſes within the firſt ten years, and lays out but 30*l.* and after thirty years of the leaſe are expired, the leſſor brings an action of covenant, and recovers 150*l.* damages, equity will neither relieve againſt the damage, nor decree the money to be now laid out in improvements; for *per* Ld. Chan. though the damages ſeem exceſſive, yet the jury were proper judges; and to decree it to be laid out now the leaſe is almoſt expired, is not proper, for it is probable the leſſee would not be ſo careful in laying it out in laſting improvements, as he would be, were it laid out at firſt. *Paſc*, 1685. (*a*) *Barker* and *Holder*, 1 *Vent.* 316, 317.

(*a*) 1 Vern. 316, S. C. not Ventris.

6. If *A.* agrees with *B.* the lord of the manor, to purchaſe a copyhold for two lives, and pays 200*l.* in part, and is to pay the remainder in three months, and then to name his lives, and take up his copy; a court is held, and the three months expire, and *B.* dies ſuddenly, and the manor comes to one who is not bound by the agreement; the executor of *B.* will be decreed to repay the money, although it is infiſted, that it was *A.*'s own laches, that he did not take up his copy. Decreed *Mich.* 1687. *Awbry* and *Keen*, 1 *Vern.* 472.

Max. Equality is equity.

7. *A.* intruſted by *B.* to receive intereſt on tallies, receives the principal, and fails, and afterwards compounds with his creditors, but *B.* would not come in without having a greater compoſition, which *A.* agrees to give; *A.* brings a bill to be relieved againſt this underhand agreement; but he having been guilty of a great fraud and breach of truſt, and he by the ſaid agreement having promiſed to make ſome ſatisfaction, it was held, that he was not intitled to any relief. *Hil.* 1707. *Small* and *Brachley*, 2 *Vern.* 602.

CAP.

CAP. V.

Amendment.

(A) *In what Caſes to be allowed.*

1. A Bill may be (*a*) amended where there are not proper parties made defendants to the ſuit. 3 *Chan. Rep.* 92.

(*a*) If there be any overſight or miſtake in the bill, which requires amendment before the defendant's appearance, it may be amended upon motion, without paying coſts; but if it be amended after appearance, coſts muſt be paid: The coſts upon a demurrer, put in for a ſlip or miſtake, are twenty ſhillings, which being paid, the party may amend without motion; but if any new matters ariſe after the cauſe is at iſſue, which is neceſſary for the plaintiff to ſet forth, this is regularly done by filing a ſupplemental bill, which the court will admit upon motion and affidavit of ſuch new matter.

2. So where ſome tenants of a manor brought a bill againſt the lord, to eſtabliſh certain cuſtoms; and he demurred, becauſe all the tenants were not made parties, either as plaintiffs or defendants; and the court gave them leave to amend their bill, and to add as many more plaintiffs as would give them letters of attorney ſo to do, and as to the reſt, to make them defendants. *Hil.* 25 *Car.* 2. *Hudſon & al'* and *Fletcher, Rep. in Chan. Temp. Finch* 114.

3. The plaintiff ſet forth a conveyance in his bill, without date, day, month, or year; and upon demurrer the court gave him leave to amend. *Trin.* 28 *Car.* 2. *Buſhell* and *Newby & al', Ibid.* 260.

4. The defendant moved to amend her anſwer, upon affidavit, that the matters untruly ſet forth were added in the margin of the draught after ſhe had peruſed it; and ſo ſhe was thereby ſurprized; and it being alledged, that no replication was filed *prout* certificate and affidavit of notice of this motion being read, and the plaintiff making no defence, it was ordered that ſhe (*b*) amend her anſwer in the ſaid matters miſtaken. Ld. Chan. and Maſter of the Rolls, *Abbute* and *Lady Dacre, Mich.* 15 *Car.* 2. 1 *Chan. Ca.* 29. And the like liberty ſaid to be given in Lord *Coventry*'s time, in the caſe of *Chettle* and *Chettle.*

2 *Freem.* 173, S. C. and ſays the S. P. was determined *inter Chettle* and *Chettle.*

(*b*) The defendant may, without notice, move to amend his anſwer in a ſmall matter; but if it be in a material point, he muſt give notice of the motion for ſuch amendment to the plaintiff's clerk or ſolicitor; and though it be in a material point, and after iſſue joined, yet the court will, on affidavit of ſurpriſe, and payment of coſts, allow of an amendment.

5. The defendant, by her anſwer, having conſented that an award made by her father might be confirmed, deſired leave to amend her anſwer in that particular, having made oath that ſhe never

never read the award, and that ſuch anſwer was prepared by her father who had wronged her in the award; but the court refuſed to give her leave to amend her anſwer. *Eaſter* 1702. *Harcourt* verſus *Lady Anderſon*, 2 *Vern.* 434. *One reaſon ſeems to be, becauſe the father was an arbitrator of her own chuſing.*

Prec. in Chan. 115, S. C.

6. A recognizance entered into to abide ſuch order as ſhould be made upon the hearing of the cauſe, being put in ſuit againſt *A.* who was one of the ſureties; it fell out, that in the title of the order for confirming the report, the words *Et Ux'* were omitted; the defendant at law took advantage thereof, and pleaded there was no ſuch order made in the cauſe; and the plaintiff perceiving the miſtake, obtained an order from the Maſter of the Rolls to amend the title of the order, by adding the words *Et Ux'*, which was afterwards confirmed by Ld. K. although it was to charge a ſurety. *Trin.* 1700. *Spearing* and *Lynn*, 2 *Vern.* 376.

7. But in a cauſe where the defendant had anſwered, and the witneſſes were examined, it happened, that in the title of the interrogatories the plaintiff was called *Thomas* inſtead of *John*, and the court would not allow the depoſitions to be read, nor the title to be amended, although moſt of the witneſſes were, ſince their examination, gone to ſea. *Eaſter* 1702. *White* and *Taylor*, 2 *Vern.* 435. *But* quære, *for this ſeems only a miſtake of the clerk, whoſe errors are frequently amended, the better to carry on the juſtice of the court.*

CAP. VI.

Annuity and Rent-Charge.

(A) *What ſhall be conſtrued a good Annuity or Rent-Charge, and whoſe Perſons and Eſtates made liable.*

(B) *How far a Court of Equity will aſſiſt, and give a Remedy for recovering an Annuity or Rent-Charge, when there is none at Law; and here of Apportionment and Extinguiſhment.*

(A) *What ſhall be conſtrued a good Annuity or Rent-Charge, and whoſe Perſons and Eſtates made liable.*

1. A Man deviſes all his lands for the payment of his debts, and deviſes an annuity out of a certain town, which the truſtees ſell; and it was decreed, that the annuity ſhould iſſue out of the other lands unſold, there being ſufficient to pay the debts. *Mich.* 28 *Car.* 2. *Lord Kennoule* and *Earl of Bedford & al'*, 1 *Chan. Ca.* 295.

2. An annuity of 20*l. per annum* was deviſed out of a rectory, and the glebe being but of 40*s. per ann.* value, and the tithes not liable to a diſtreſs by law (*a*), the Maſter of the Rolls decreed the whole rectory to be liable to pay the annuity. *Hil.* 18 & 19 *Car.* 2. *Thorndike* and *Collington*, 1 *Chan. Ca.* 79.

Max. Equity ſuffers not a right to be without a remedy.—But note the rights here intended are thoſe which the law acknowledges to be ſuch, and never gives judgment againſt them, though it cannot give a remedy for them; and not equitable rights, for which equity gives a remedy in the very creation of them.

(*a*) Of things which lie in grant, and not in tenure, no rent can be reſerved, which will be liable to a diſtreſs, as advowſons, tithes, fairs, franchiſes, &c. 1 *Inſt.* 44.

3. If a man covenants to ſettle lands of ſuch a value, or an annuity out of land, and he has no land at the time, but purchaſes lands afterwards, which he voluntarily deviſes, yet the lands ſhall be liable to the annuity in the hands of the deviſee. *Tooke* and *Haſtings*, 2 *Vern.* 97.

4. A man having debauched a young woman, and intending afterwards to put a trick upon her, ſettled an annuity upon her of 30*l. per ann.* for life, out of an eſtate which he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an eſtate which he had of his own; and this decree was afterwards

afterwards affirmed on appeal to the Houſe of Peers. Cited in the *Marchioneſs of Anandale* verſus *Harris* (*a*), *Trin.* 1727. and ſaid to have been adjudged about a year before.

(*a*) *Vide* Title Bonds and Obligations *Pl.* 6. p. 87.

5. *A.* is tenant in tail, ſubject to a rent-charge to *B.* for life; *B.* and *A.* died, the rent-charge being in arrear; and the queſtion was, whether the iſſue in tail is liable to the executor of *B.* within the ſtatute of 32 *H.* 8. to pay the arrears incurred in the life-time of his anceſtor; and Ld. Chan. ſeemed to be of opinion, that the heir was not liable, he not claiming under the tenant in tail, tho' if the rent-charge had continued, he would be liable to be diſtrained for the whole arrear, which was *ſummum Jus*; and tho' this caſe ſhould be within the ſtatute, yet he ſaid the proper remedy againſt the iſſue in tail was at law. *Trin.* 1708. *Lord Fairfax* and *Lord Derby*, 2 *Vern.* 612.

(B) *How far a Court of Equity will aſſiſt, and give a Remedy for recovering an Annuity or Rent-Charge, when there is none at Law; and here of Apportionment and Extinguiſhment.*

1. A Rent of 1*l.* 14*s.* *per annum* was granted by King *H.* 6. to *Eaton-College*, iſſuing out of certain lands; the bill ſuggeſts, that the college did not know where the lands lay, ſo as to enable them to diſtrain, and therefore pray that the executor of the tertenant may be anſwerable for the arrears, which the Maſter of the Rolls thought reaſonable, in reſpect that the perſonal eſtate was increaſed thereby, and decreed it accordingly. *Eaton-College* and *Beauchamp*, *Hil.* 20 *Car.* 2. 1 *Chan. Ca.* 121.

2. The bill was for ſecuring the payment of 5*l.* *per annum* rent, and likewiſe the arrears thereof, ſuggeſting that the deeds by which it was granted were loſt; and there being proof that it was conſtantly paid before the twelve laſt years, the Maſter of the Rolls decreed the arrears and growing rent, ſaying, It was reaſonable, becauſe it did not appear what kind of rent it was, and ſo no remedy at law. *Collet* and *Jaques*, *Hil.* 20 & 21 *Car.* 2. 1 *Chan. Ca.* 120.

3. So where a bill was brought, ſuggeſting that the plaintiff did not know the nature of the rent, nor the boundaries of the land, ſo as to be able to declare with exactneſs; and the court ſaid they would decree it, but at the importunity of the defendant directed a trial, whether there was any ſuch grant, or not. *Cox* and *Foley*, 1 *Vern.* 359.

4. The plaintiff ſuggeſts, that he having the grant of a rent-charge iſſuing out of certain lands, the defendant, to hinder him from a diſtreſs, converted the premiſſes into tillage; and Ld. Chan. directed to have it tried, whether there was any fraud uſed to prevent the plaintiff from diſtraining, and declared, if there was, he would grant relief. *Davy* and *Davy*, *Mich.* 2 *Car.* 2. 1 *Chan. Ca.* 144. But if there be a remedy at law, equity will rarely grant any, or change the nature of the rent. *Vide* 1 *Chan. Ca.* 185.

5. If

5. If a man grants a Rent-charge out of all his lands, and afterwards ſelleth the lands by parcels to divers perſons, the grantee of the rent-charge ſhall be reſtrained from levying the whole rent on one of the purchaſers. *Cary* 3.

6. *A.* on his marriage ſettled a rent-charge on his wife for her iointure, and afterwards deviſed to the wife part of the land ſo ſettled; and it was held, that there ſhould be no (*a*) apportionment, for the deviſe was intended her as an advantage; and it was not declared to be in ſatisfaction of her dower, and therefore ſhe may diſtrain for the rent on any part of the land. *Knight* and *Calthorp*, *Mich.* 1685. 1 *Vern.* 347.

(*a*) Regularly at law there can be no apportionment of a rent-charge, becauſe it is an intire thing. 1 *Rol. Abr.* 234. As if the grantee purchaſe part of the land, he cannot bring a writ of annuity, becauſe he muſt declare on the whole deed. *Co. Lit.* 148. Likewiſe if part of the land out of which the annuity iſſues, is evicted by a prior title, there can be no apportionment; but then the reſt of the land is chargeable, or the party may bring a writ of annuity. 1 *Inſt.* 148. But by the act of God it may be apportioned; as if part of the land out of which the rent iſſues deſcend on the grantee. 1 *Rol. Abr.* 236.

7. If *A.* hath a rent-charge iſſuing out of certain lands, and *B.* having notice of this rent, purchaſes thoſe lands amongſt others; and after *B.* ſells the other lands, and alſo ſome few acres of the land charged by general words, and deſires *A.* and her huſband to join in a fine to the purchaſer, aſſuring her it would not prejudice her, which was accordingly done; though the rent by *A*'s act was extinguiſhed; yet, becauſe there was no conſideration given for, or agreement to extinguiſh the rent, ſhe ſhall be relieved. ——— and *Hawkes*, *Hil.* 27 & 28 *Car.* 2. 1 *Chan. Ca.* 273.

8 *A.* ſeiſed in fee of a little meſſuage of 8*l. per Annum*, and poſſeſſed of a perſonal eſtate of 250*l.* value, deviſed ſeveral legacies, and gave his eldeſt ſon *B.* the plaintiff, 5*l.* a year for forty years, if he ſhould ſo long live, and deviſed to his ſecond ſon *C.* the ſaid meſſuage in tail, and made him his executor and reſiduary legatee. *C.* during his life, paid the annuity, but being now dead, his wife and executrix inſiſts, that there being no charge on the lands by the words of the will, and that ſhe not having aſſets, is not obliged to pay the annuity; and further alledges, that her huſband, having docked the intail, and conveyed the premiſſes to *J. S.* in truſt for the plaintiff, for the ſecuring the payment of 50*l.* which he borrowed of him, his right, if he had any, is by the ſaid mortgage extinguiſhed; but notwithſtanding the court decreed the annuity, together with the arrears, to be paid, and an account of the profits of the eſtate to be taken for that purpoſe, and ſaid, that the executor being deviſee of the land, made the land liable; and as to the objection of his having (*b*) extinguiſhed his right by acceptance of the mortgage, it had no foundation in a court of equity. *Elliot* and *Handcock*, *Trin.* 1690. 2 *Vern.* 143.

(*b*) If the grantee of a rent-charge purchaſes part of the land out of which the rent iſſues, he ſhall never afterwards have a writ of annuity, for his remedy is extinguiſhed by his own folly. *Popb.* 86. *Co. Lit.* 148.

CAP. VII.

Anſwers, Pleas, Demurrers, &c.

(A) *What ſhall be a full and ſufficient anſwer.*

(B) *Where the party may conclude, charge or diſcharge himſelf by his anſwer.*

(C) *What ſhall be a good plea, and well pleaded.*

(D) *What ſhall be a good cauſe of demurrer.*

(E) *Anſwering, pleading, and demurring to the ſame Bill.*

(F) *Concerning the replication.*

As to the manner of compelling a defendant to anſwer, at what time, and anſwering upon interrogatories, *vide* title *Proceſs*.

(A) *What ſhall be a full and ſufficient anſwer.*

1. WHERE in a joint and ſeveral anſwer by *A.* and *B.* if *A.* for himſelf anſwers, and *B.* ſays that he hath peruſed the anſwer of *A.* and believes it to be true, ſuppoſing *B.* charged with nothing of his own knowledge, ſuch a relative anſwer is *(a)* ſufficient; but it is otherwiſe, where the defendants anſwer ſeverally. *Hil.* 1659. *Walker* and *Norton*, *Hard.* 165. *in Scaccario.*

(a) An anſwer to a matter charged as a defendant's own fact, muſt regularly be without ſaying, To his Remembrance, or, As he believeth; if it be laid to be done within ſeven years before, unleſs the court, upon exceptions taken, ſhall find ſpecial cauſe to diſpenſe with ſo poſitive an anſwer; and if the defendants deny the fact, he muſt traverſe or deny it (as the cauſe requires) directly, and not by way of negative pregnant; as if he be charged with the receipt of a ſum of money, he muſt deny or traverſe, that he hath not received that ſum, or any part thereof, or elſe ſet forth what part he hath received; and if a fact be laid to be done, with divers circumſtances, the defendant muſt not deny, or traverſe it literally, as it is laid in the bill, but muſt anſwer the point of ſubſtance poſitively and certainly. *Clarendon's Orders*, 18 *Car* 2.

2. In

2. In a bill for tythes of conies by cuſtom, the defendants by anſwer deny the cuſtom, but do not diſcover how many conies they killed, nor the value of them; yet it was reſolved well enough (the rather, becauſe the demand was againſt common right) for there being a full anſwer given to the thing in demand, till that be tried, the defendants are not bound to diſcover; and if it ſhould be tried, the defendants are not bound to diſcover; and if it ſhould be otherwiſe, the defendant, by a feigned ſuggeſtion, might be forced to diſcover any thing; but if in ſuch caſe the matter be found againſt the defendant, he ſhall after be examined upon interrogatories. *Paſc.* 13 *Car.* 2. *Randall* and *Head. Hard.* 188.

3. But where there is no ſuch great inconvenience, as upon a bill againſt an executor to diſcover aſſets, he muſt anſwer, though he denies the debt, becauſe it concerns the act of another. *Ibid.*

4. If a bill be brought againſt three for a joint-demand, and one of them by anſwer ſays, he believes and hopes to prove the debt paid; and the cauſe is heard on bill and anſwer, as to him, the plaintiff can have no decree; for though the defendant does not directly ſwear that the money is paid, yet his anſwer muſt be taken to be true, becauſe the plaintiff, by not replying to him, has excluded him of the benefit of his proof; and the rather, becauſe it appears a piece of cunning in the plaintiff to proceed againſt him, who was moſt ignorant of the matter; but upon payment of coſts he may reply to the other defendants. *Hil.* 1682. *Barker* and *Wyld*, 1 *Vern.* 140.

5. On exceptions to an anſwer, the defendant having ſworn he received no more than the ſum of ——— to his remembrance, it was allowed to be a good anſwer. *Hall* and *Bodily*, 1 *Vern.* 470.

6. If the plaintiff excepts to the anſwer, and the exceptions are referred, and the maſter certifies the anſwer inſufficient in the points excepted to, and then the defendants fully anſwer the charge of the bill; but in truth the exceptions are longer than the bill; and the maſter, upon a reference of the ſecond anſwer, reports the anſwer inſufficient in the points excepted unto, and the defendants except unto the report, and inſiſt, that they had anſwered well, having anſwered all the matters of the bill; yet they ſhall anſwer all the matters of the exception as well as of the bill, they not having excepted to the firſt report. *Criſp* and *Nevil*, 1 *Chan. Ca.* 60.

7. If there are two defendants to a bill, and one of them puts in an inſufficient anſwer, which is ſo reported, and on exceptions to the maſter's report, his report is confirmed by Ld. Chan. and afterwards the other defendant puts in juſt ſuch another anſwer, and inſiſts on the ſame matter; the court, for avoiding of delay, will judge of the inſufficiency of this ſecond anſwer without ſending it to a maſter. *Mich.* 1682. *Weſt* and *Lord Delaware & al'*, 1 *Vern.* 74.

(B) *Where the party may conclude, charge or diſcharge himſelf by his anſwer.*

1. THE plaintiff brought a bill againſt the defendant to redeem or be foreclоſed; the defendant, in his anſwer, offered to pay the plaintiff what was due on his mortgage; but finding afterwards that there was a mortgage prior to the plaintiff's, and that the mortgagor had made a deed of truſt of theſe lands for the payment of his debts, and that the creditors had obtained a decree, that they ſhould be paid in proportion with the plaintiff, he would willingly retract; but though it appeared that the circumſtances of the caſe were thus varied, yet the maſter of the rolls held the defendant to the offer in his anſwer. *Paſc.* 1687. *Holford* and *Burnell*, 1 *Vern.* 448.

2. But where a perſon having ſworn in his anſwer, to avoid a ſequeſtration, that he was ſatisfied a debt owing to him, in a bill now brought by him for the ſaid debt, the maſter of the rolls would not ſuffer that anſwer to be read againſt him. *Mich.* 1669. *Jones* and *Lenthall*, 1 *Chan. Ca.* 154.

* 3. Where the defendant pleaded himſelf a purchaſer for a valuable conſideration, without notice, *as by the deed*, &c. *ready to be produced, may appear*; and upon arguing the plea, it was ordered to ſtand for an anſwer; and it being moved, that the defendant might leave the deed with his clerk in court, that the plaintiff might have the ſight and peruſal of it, purſuant to the offer in his anſwer, and though the bar (being aſked by the court how the courſe was) agreed, that by his offer the defendant had made the deed part of his anſwer; and therefore it had been the courſe to order it to be produced; yet Ld. Chan. ſaid, he would not bind the plaintiff, being a purchaſer, by the improvident offer in his anſwer. *Mich.* 1698. *Watkins* and *Hatchet*.

4. It was ſaid *per Cur'*, *Mich.* 1690. That the caſe of *Howard* and *Brown* was the firſt caſe in this court, where, becauſe a man had charged himſelf by anſwer, that this anſwer ſhould be allowed as a good diſcharge, and that it ought to be the laſt. 2 *Vern.* 194. *Where an accountant may charge or diſcharge himſelf by anſwer*, vide title *Account*, letter (B).

5. If the plaintiff conveys an eſtate abſolutely to the defendant, and he afterwards brings a bill to redeem, and the defendant inſiſts, that the conveyance was abſolute; but confeſſes, that after the money paid, with intereſt, it was to be in truſt for the plaintiff's wife and children; and the plaintiff replies to the anſwer; the truſt will be decreed for the benefit of the wife and children, though no other proof of the truſt; for it appears by the defendant's own confeſſion, that he was not to have the eſtate abſolutely. *Paſc.* 1693. *Hampton* and *Spencer*, 2 *Vern.* 288.

(C) *What ſhall be a good plea, and well pleaded.*

1. THE bill being to be relieved touching a debt due to the plaintiff as executor; the defendant pleaded an outlawry of the plaintiff in bar, but the (*a*) plea was over-ruled, the plaintiff ſuing in *auter droit* as executor. *Killigrew* and *Killigrew*, 1 *Vern.*

(*a*) Pleas in equity are of three kinds, &c. 1ſt, A plea to the juriſdiction; 2dly, A plea to the perſon; 3dly, A plea in bar. A plea to the juriſdiction muſt ſhew, that the lands lie, that the matters were tranſacted, or that the party lives out of the power of the court, and reach of its Proceſs, as out of the kingdom, or in a County Palatine, &c. but for this *vide* title *Courts, and their Juriſdiction.* A plea to the perſon muſt ſhew, that the party is diſabled by outlawry, excommunication, &c. A plea in bar, as it goes more to the merits, and often cauſes a perpetual diſmiſſion of the bill, the court will ſometimes order it to ſtand for an anſwer. Pleas of this kind are various, as acts of parliament, fines and recoveries, releaſes, &c. purchaſing without notice; but notice muſt be denied. 1 *Vern.* 179. 2 *Vent.* 361, S. P. by way of anſwer, and not by way of plea. 1 *Chan. Ca.* 161. And note, that if there be any fraud alledged in the bill, it muſt be denied by way of anſwer, and not by way of plea. 1 *Vern.* 185.

2. A former bill depending was pleaded in bar of a ſecond; but though both bills were of the ſame nature and effect, yet as the latter had ſome new matter, ordered, that being the plea was good, the plaintiff ſhould pay the uſual coſts of a plea allowed, but the defendant to anſwer the ſecond bill, and the former bill diſmiſſed with twenty ſhillings coſts. *Crofts* and *Wortley*, *Mich.* 26 *Car* 1. 1 *Chan. Ca.* 241.

3. The bill being to have an account of a truſt, the defendant pleaded he was intruſted for three children, *viz.* for the plaintiff and his two brothers, and that the other two not being made parties, he was not bound to anſwer; for otherwiſe he might be thrice called to an account for the ſame matter, and the plea was allowed. *Hanne* and *Steevens*, 1 *Vern.* 110. *Who are to be parties to the Suit, vide* title *Bill*, letter (B).

4. The plaintiff intitles himſelf as adminiſtrator; the defendant pleads the plaintiff is not adminiſtrator; it was objected, this was a negative plea: *Per Cur'*, allow the plea, it is a good plea in abatement at law. *Win* and *Fletcher*, 1 *Vern.* 473.

5. The bill was, that the plaintiff's father, by ſettlement on his firſt marriage was only tenant for life, or elſe tenant in ſpecial tail, and the plaintiff was the eldeſt ſon of that marriage, and that the defendant claimed by a ſubſequent ſettlement, having notice of the firſt; the defendant pleaded a fine levied by the father, and ſet forth her title under the ſecond ſettlement, and inſiſted ſhe was a purchaſer; but did not plead ſhe had no notice of the firſt ſettlement. Ld. K. The bill being in the disjunctive, the defendant might take it either way; and having pleaded a fine, which is a bar, ſuppoſing the father to be tenant in tail, allowed the plea. *Creſſet* and *Kettleby*, *Hil.* 1683. 1 *Vern.* 219.

6. Two of the defendants, being the officers of the Exchequer, plead the privilege of the exchequer; but the plea was over-ruled, becauſe there was a third defendant, who had no right of privilege.

Fanſhaw

Fanſhaw and *Fanſhaw*. *Trin.* 1684. 1 *Vern.* 246. *Vide* title *Privilege.*

7. If a bill be brought for an account of the profit of mines, and the defendant pleads a ſpecial act of parliament, which gives an excluſive juriſdiction of all matters ariſing within the mines to the courts of *A.* but does not aver there is a court of equity, there the plea will be over-ruled. By Ld. Chan. *Trin.* 1682. *Strode* and *Little*, 1 *Vern.* 58.

2 *Freem.* 175, S. C. Vid. 2 *Freem* 43 2 Equ. Abr. 70. Cr. 3. Cont. As to the conſiderationwhich muſt be expreſly aver'd, *Quær.*

8. If a bill is brought to be relieved upon a truſt, and charges the defendant with notice of the truſt, before the taking of his conveyance; the defendant, by way of anſwer, may deny the notice, and plead he is a purchaſer for valuable conſideration, without ſhewing what the conſideration was; though it was objected, that 5*s.* is a valuable, though not an equitable conſideration; but where the bill charges notice before the defendant took his conveyance, and the defendant, by way of anſwer, denies the notice at the time of his purchaſe or contract, and pleads he is a purchaſer, *&c.* this plea is naught, being founded upon the anſwer, which denies only notice at the time of the purchaſe; which may be underſtood of the contract, and not of the execution of the conveyances. By Ld. Chan. and *Tyrrel* J. *Mich.* 10 *Nov.* 15 *Car.* 2 *More* and *Mayhow*, 1 *Chan. Ca.* 34.

9. The plaintiffs being mortgagees, the bill was to diſcover ſettlements, and what eſtate the mortgagor had in him; to this bill the defendants pleaded two ſeveral ſettlements, whereby the mortgagor was only tenant for life; but the plea was over-ruled, becauſe the defendants did not offer, by way of anſwer, to admit the tenant for life to be dead, that ſo the plaintiff might try the validity of thoſe ſettlements at law; for if they ſhould expect till the tenant for life was dead, their witneſſes that could prove the fraud might be likewiſe dead; beſides, the defendant pleaded thoſe ſettlements to be made after marriage, in purſuance of promiſes and agreements made before marriage, and did not ſet forth what thoſe promiſes and agreements were. *Hil.* 1682. *Lord Keeper & al'* verſus *Wyld & al'*, 1 *Vern.* 139.

10. A plea of a purchaſer for a valuable conſideration over-ruled, becauſe the defendant did not alledge ſeiſin and poſſeſſion in the perſon from whom he bought. *Trin.* 1684. *Trevanian* and *Moſſe*, 1 *Vern.* 246.

11. The bill was, to be relieved touching certain lands, which the plaintiff claimed title to as heir on the part of his father; the defendant pleaded, that the mother was the purchaſer of thoſe lands, and that the defendant was heir on the part of the mother; but it being not pleaded that the defendant was heir of the whole blood to the mother, (and in fact he was only of the half blood to the mother) for that reaſon the plea was over-ruled. *Hil.* 1686. *Addiſon* and *Hindmarſh*, 1 *Vern.* 442.

12. The defendant pleads, that the plaintiff brought a former ſuit for the ſame matters, which ſuit is ſtill depending for ought he knows to the contrary; for the plaintiff it was inſiſted, that this plea was not good, becauſe he does not poſitively aver, that the former ſuit is ſtill depending; and no iſſue can be taken upon his knowledge to the contrary; but the maſter of the rolls allowed the plea, becauſe the plaintiff ought not to have ſet it down to be argued,

for

for by that he admits, that the former ſuit for the ſame matter is depending; but the plea ought to have been referred to a maſter, to examine whether there was a former ſuit depending for the ſame matter, or not; and ſaid, there needs no poſitive averment, that the former ſuit is ſtill depending, for that is examinable by the maſter; and the defendant never ſwears a plea of a former ſuit depending, but it is always put in without oath. *Trin.* 1685. *Urlin* and ———, 1 *Vern.* 332. *Vide Hard.* 160. where a plea was held naught for want of an averment in the concluſion.

* 13. A plea was held ill, becauſe it went as to any fraud ſuggeſted, *&c.* and alſo becauſe it did not aver, that the accounts which were pleaded were juſt and true accounts. *Mich.* 1727. *Haſtings* and *Draper*.

* 14. One *Pordant* had brought a bill in this court againſt the defendants, for ſeveral ſhares in their ſtock, and after ſold a ſixth part of what he was intitled to from the defendants to the plaintiff, who now brought his bill for his ſixth part; the defendants pleaded, that *Pordant* had before brought his bill for ſeveral ſhares, of which the plaintiff's now demand was part, and that the former ſuit was ſtill depending; but becauſe he had not averred, that the defendants had appeared to the former ſuit, or put in their anſwer, or that they were ſo much as ſerved with proceſs to appear, the plea was diſallowed; for it is no ſuit depending till the parties have appeared, or been ſerved to appear, but only a piece of parchment thrown into the office, which may lie there for ever, and never come to a ſuit; but if the former ſuit depending had been well pleaded, the court was clear of opinion it would have been a good plea, though the bill was brought by another perſon, and not by the now plaintiff; for elſe the plaintiff in the other ſuit, after his bill brought, might aſſign his ſhares to twenty ſeveral perſons, who might each of them bring ſeveral bills, and ſo harraſs the defendants, for what the firſt ſuit was ſufficient. *Trin.* 1729. *Moor* and *Welſh Copper Company*.

(D) *What ſhall be a good Cauſe of Demurrer.*

1. IF in a bill brought againſt *B. C. D.* and *E.* the plaintiff ſets forth that he is keeper of *G.* Caſtle, and prays *B.* may diſcover what title he hath to a certain meadow which belongs to the ſaid office, and that the defendants, as brewers of the city of *G.* by cuſtom ought to pay to the ſaid keeper a certain annual ſum, *&c.* this bill is naught, becauſe it concerns things of diſtinct natures, and is brought againſt ſeveral perſons, which will occaſion ſeveral anſwers and examinations; and if ſuffered to be put all in one bill, each party would be obliged to take copies of what no way concerned his own cauſe, whereby his charge would be increaſed to no purpoſe. Reſolved upon demurrer, 15 *Car.* 2. *Berk.* and *Harris*, *Hard.* 337.

2. But where the defendant demurred, becauſe the plaintiff's bill was brought againſt ſeveral defendants for ſeveral diſtinct matters; yet the demurrer was over-ruled; becauſe the plaintiff, by his bill, had charged the defendant with combination, which the defendant had not denied by anſwer. *Mich.* 1686. *Powell* and *Arderne*, 1 *Vern.* 416.

3. Where

3. Where a man demurs, for that the bill contains ſeveral matters not relating one to the other, and in ſome whereof the defendant is not concerned, if by anſwer the defendant doth more than barely deny combination and confederacy, he over-rules his demurrer. *Trin.* 1687. *Heſter* and *Weſton*, 1 *Vern.* 463.

4. A bill was exhibited againſt the defendant, to have her diſcover, whether ſhe was married ſince the death of her huſband; to which ſhe demurred, and aſſigned for cauſe, that ſeveral goods and chattles were deviſed to her by her huſband, which ſhe was to enjoy during her widowhood only, and that a diſcovery might amount to a forfeiture of her intereſt in them; and the court allowed the demurrer. 24 *Car.* 2. *Monnins* verſus *Monnins*, 2 *Chan. Rep.* 68. Vide *bills of diſcovery*, title *Bills*.

5. The bill was to eſtabliſh an agreement for a ſeparate maintenance for the defendant's wife, and (amongſt other things) prayed a diſcovery of ſeveral unkindneſſes and hardſhips, which the defendant, as it was pretended, had uſed towards his wife, to make her recede from this agreement; to which diſcovery the defendant demurred, for that it was not a matter properly examinable or relievable in this court; and the demurrer was allowed. *Mich.* 1683. *Hincks* and *Nelthorpe*, 1 *Vern.* 204.

6. A bill being exhibited to be relieved againſt a bond of the teſtator's, ſuggeſting that it was entered into without any conſideration, it being only for that the teſtator had unlawfully kept company with the defendant, and had a baſtard by her; and a demurrer to that part of the bill was allowed; although it ſeems by the caſe to be admitted, that a demurrer was not the proper way to be relieved for ſcandal, but that the bill ought to be referred, and the ſcandal expunged. *Mich.* 1682. *Page* and *Neale*, 1 *Vern.* 107. *Qu.* If the demurrer was allowed in this caſe: by the caſe in *Vern.* it ſeems to me not allowed.

7. If an infant is intitled to the truſt of lands in fee, which were deviſed to her by her uncle, and ſhe marries without her father's conſent, and the father brings a bill againſt the huſband and wife, and her truſtees, to the intent a proviſion might be made for her and her children, out of theſe lands, *&c.* and the huſband and wife demur, this demurrer will be allowed; for it appears by the plaintiff's own ſhewing, that he hath no right either in law or equity to the lands in queſtion. *Paſc.* 34 *Car.* 2. *Micoe* and *Powell*, 1 *Vern.* 39. But where a huſband is obliged to make a ſuitable ſettlement on his wife, *vide* title *Baron and Feme*.

8. In a bill to be relieved againſt an award made by ſome of the members of the company, touching the *quantum* of freight due to the plaintiff from the company; the arbitrators and ſome of the particular members being made defendants, they demurred to the whole bill, becauſe the plaintiff could have no decree againſt them, and their anſwers would be no evidence againſt the company; and the plaintiff might examine them as witneſſes; and the demurrer was allowed, without putting them to anſwer as to matters of fraud and contrivance. *Trin.* 1700. *Dr. Steward* verſus *Eaſt-India Company*, 2 *Vern.* 380. *Vid. aut.* 2 *Equ. Abr.* 78. *Ca.* 8.

9. A bill was brought by the obligee in a bond againſt the heir of the obligor, alledging, that he having aſſets by deſcent, ought to ſatisfy this bond, to which the defendant had demurred, becauſe the

the plaintiff had not expreſly alledged in the bill, that the heir was bound in the bond; and though it was alledged, that the heir ought to pay the debt, yet that was held inſufficient, and the demurrer was allowed. *Croſſing* and *Honor*, 1 *Vern.* 180.

10. A bill being exhibited to diſcover a perſonal eſtate and will; the defendants demurred, becauſe it appeared on the plaintiff's own ſhewing, that they were neither creditors or legatees; and the demurrer was allowed. *Hil.* 25 *Car.* 2. *Blondell & Ux'* and *Pannett & al'*, *Finch* 88.

11. A bill being exhibited to prove a will, and perpetuate the teſtimony of the witneſſes; the defendant, upon croſs examination of one of the witneſſes, exhibited an interrogatory to him to diſcover what deeds or ſettlements he knew the teſtator had made; to which the witneſſes demurred, as not pertinent to the matter in iſſue; and Ld. K. over-ruled the demurrer, becauſe he would not introduce ſuch a precedent as for a witneſs to demur; for it did not concern the Witneſs to examine what was the Point in Iſſue. *Aſhton* and *Aſhton*, 1 *Vern.* 165.

12. There can be no Demurrer to a *Subpœna* in nature of a *ſcire facias*, for the *ſubpœna* is no record, nor any where filed. *Eaſter* 16 *Car.* 2. *Wan* and *Lake*, 1 *Chan. Ca.* 50. (*a*) Neither can there be a demurrer to an anſwer. *Trin.* 16 *Car.* 2. *Williams* and *Owen & al'*, 1 *Chan. Ca.* 56. (*b*) But *vide* the caſe of *Wakelin* and *Walthal*, *Mich.* 31 *Car.* 2. 2 *Chan. Ca.* 8. *cont'*.

(*a*) 2 *Freem.* 180. *Ward.* and *Lake*, S. C. 3 *Chan. Rep.* 15.

(*b*) 2 *Freem.* 181, S. C. ſays it was a demurrer to an anſwer to a bill of review, and that the demurrer was, becauſe it would tend to perjury and infiniteneſs to examine things examined and decreed, and that the court was of that opinion; but that there could be no demurrer to an anſwer in equity. Ruled, that there ſhould be no examination of that which had been examined before. *Gilb. Eq. Rep.* 234, S. C. cited by Ld. C. B. *Gilbert*.

(E) *Anſwering, Pleading *, and Demurring to the ſame bill.*

* *Vide* Title *Account* (C).

1. THE defendant had pleaded a former decree in bar to the plaintiff's bill, but the plea was not ſuffered to be opened, for that it came in after a proclamation returned; and alſo came in by a general commiſſion, which was to take the anſwer only, and not plead, anſwer, or demur. *Mich.* 1684. *Loyd* and *Gunter*, 1 *Vern.* 274.

2. Where the defendant anſwers to part, and pleads to all other matters not anſwered unto, the plaintiff cannot put in exceptions to the anſwer, till he has firſt argued the plea, or obtained an order, that the plea ſhall ſtand for an anſwer, with liberty to except to the matters not pleaded unto. *Mich.* 1685. *Dannell* and *Reyney*, 1 *Vern.* 344.

* 3. The plaintiff brought his bill to be relieved againſt a fraud in the defendant, in cauſing a ſhip to be ſunk, upon which he had made ſeveral inſurances, and the plaintiff had ſubſcribed ſeveral of the policies. Defendant, as to part, pleads pendency of a former ſuit, and then anſwers to part, and denies all the Fraud charged on him by the bill: plaintiff replies generally to the anſwer, without taking notice of the plea; and witneſſes were examined on both ſides, and the cauſe heard, and a trial at law directed, which went againſt the defendant, who petitions for a rehearing; and on the rehearing the defendant inſiſted, that the plaintiff had been utterly irregular in his proceedings, for not ſetting down the plea

to be argued and disposed of by the court before he replied; for the plaintiff himself cannot take upon him to over-rule it, be it what it will, but must bring it for judgment before the court, and for want of that, all was irregular, and ought to be set aside; but my Lord Keeper and Master of the Rolls were both of opinion, that the defendant by these proceedings had waved his plea, and therefore the proceedings were regular; so the cause went on, and the former decree was affirmed. *Mich.* 1701. *Lucas* and *Holder*.

4. Where a defendant has demurred, he may assign another cause of demurrer at the bar, paying costs; and if such cause of demurrer is over-ruled, he ought to pay double costs; but where a defendant has pleaded, and there is no demurrer in court, he cannot demur at the bar, though he would pay costs. *Mich.* 1682. *Durdant* and *Redman*, 1 *Vern.* 78. This not the present practice, *Vid.* 2 *Will. Rep.* 369. 371.

* 5. The plaintiff's bill was to establish a voluntary surrender made by him and his wife of her lands, to the use of him and his heirs, against the defendant, who was the only daughter and heir of the plaintiff's wife, by a former husband; and the wife was now dead; this surrender was made in pursuance of a power reserved by a former surrender to the wife, to surrender it to such uses as she by writing, or last will, in the presence of three witnesses, should direct or appoint; and the present surrender, under which the plaintiff claims, was made in the presence of two witnesses only, who subscribed their names; but the deputy steward, who took the surrender, had set his name to it, and so might be considered as a third witness, on which the bill was brought to establish this as a good surrender, pursuant to the power; the defendant pleaded, and claimed title under a will made by the wife, in pursuance of her power, executed in the presence of three witnesses, antecedent to the surrender to the use of the plaintiff, and likewise demurs; for that if the plaintiff had any title, it was a title merely at law, and he might bring his ejectment, if he thought fit; and it was objected, that this plea and demurrer were for one and the same thing, and therefore inconsistent and contradictory in themselves; for the plaintiff may reply to the plea, and go on upon that in this court; but the demurrer says he has nothing to do in this court, but must go to law; so that the one is to keep him here, and the other to send him to law; and though it is frequent to plead to one part of a bill, and demur to another part; yet it was never known, that the defendant pleaded and demurred to one and the same part of the bill, by reason of the inconsistency. On the plea being first, it was insisted That gave this court jurisdiction, and then the demurrer afterwards, to send the plaintiff to law, came too late; or at least it was urged, that the demurrer had over-ruled the plea, and that both could not stand. Ld. Chan. seemed to think the plea was good, as a plea of the defendant's title, and the demurrer good likewise, as it was a demurrer to the plaintiff's title; but at last he over-ruled the plea, and allowed the demurrer. *Trin.* 1728. *Cotter* and *Layer*.

(F) *Concerning the Replication.*

1. IF there is a plea and anſwer to the ſame bill, and the plaintiff replies to the plea only, it will be irregular; for the replication muſt be to the anſwer, as well as the plea. The cauſe put off for that irregularity, *Nichol* and *Wiſeman*, 2 *Vern.* 46.

2. If the plaintiff replies to an auſwer, and without rejoinder, and giving rules for publication, brings the cauſe to a hearing, the anſwer ſhall be taken wholly true, as if there had been no replication; for the opportunity which the defendant had to prove his anſwer was taken from him. *Per* Ld. Chan. 3 *Mar.* 1679. *Groſvenor* and *Cartwright*, 2 *Chan. Ca.* 21.

3. If after a plea or demurrer to a ſpecial replication allowed, the plaintiff may be admitted to put in a general replication, *Q. & vide Noſworthy* and *Baſſet*, *Mich.* 1685. 1 *Vern.* 351. where it was urged by counſel that he may; but the court refuſed to give any opinion.

* 4. The plaintiff ſet down this cauſe to be heard on a bill and anſwer, and had a decree againſt the defendant by default; and when the defendant came to ſhew cauſe againſt the decree, it was altered in his favour; the plaintiff petitioned to rehear the cauſe, and at the rehearing prayed leave to reply to the defendant's anſwer, and had it, paying coſts. *Mich.* 1699. *Lord Donegall* and *Warr.*

CAP.

CAP. VIII.

Assignment and Privity.

(A) *What things or interest may be assigned in equity.*

(B) *The Privity of Contract or estate being destroyed, what remedy Grantees or Assignees shall have against each other in equity.*

(A) *What Things or Interest may be assigned in Equity.*

1. IF a man indebted to several persons sells his lands, and takes a bond for the money from the purchaser, and assigns these bonds to one of his creditors, such assignment is (*a*) good in equity. *Rep. Temp. Finch* 299.

(*a*) Possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law. 1 *Inst.* 214. And it has been adjudged in *B. R.* that an assignee of a covenant could not sue in equity to have the benefit of the covenant, it being against law to assign a covenant; and a prohibition was granted to the court of requests for such a suit there. 1 *Rol. Abr.* 376. But though a bond cannot be assigned over, so as to enable the assignee to sue in his own name; yet he has by the assignment such a title to the paper and wax, that he may keep or cancel it. 1 *Inst.* 232.

2. A chose in action is assignable in equity upon a consideration paid. *Per Cur.*' 2 *Vern.* 595. But there must be a consideration. 3 *Chan. Rep.* 90. *Vid. aut.* 3 *Will. Rep.* 197, 199. 2 *Equ. Abr.* 89. *pl.* 15.

3. If *A.* assigns bonds to *B.* to indemnify him from a debt for which he was bound for *A.* and afterwards *A.* becomes a bankrupt, the assignees of *A.* the bankrupt can have no better right to these bonds than the bankrupt himself: and he being bound by the assignment, they are bound likewise. *Hil.* 1701. *Peters & al'* and *Soame & al'*, 2 *Vern.* 428.

Vide title *creditor and debtor* (C) *Pl.* 5.

4. In the case of an assignment of a bond, the assignee alone becomes entitled to receive the money; and payment to the obligee after notice of the assignment, is not good. *Per* Ld. K. in the case of *Baldwin* and *Billingsley*, 26 *Feb.* 1705, 2 *Vern.* 539, 540. But payment to the obligee, without notice of the assignment, is good, 15 *July* 26 *Car.* 2. *Ashcomb*'s case, 1 *Chan. C.* 232. An assignee

aſſignee muſt take it, ſubject to the ſame equity that it is in the hands of the obligee. *Vide* 2 *Vern.* 692.

5. As if on a treaty of marriage between *A.* and the daughter of *B.* the mother of *A.* ſurrenders part of her jointure to enable her ſon to make a ſettlement, and *B.* agrees to give his daughter 3000*l.* portion, and *A.* without the privity of his mother, gives a bond to *B.* to pay back 1000*l.* at the end of ſeven years, and *B.* aſſigns this bond to his creditors; yet it ſhall be delivered up as obtained in fraud of the marriage-agreement; for although a bond is aſſignable in equity, yet it ſtill remains liable to the ſame equity that it was in the hands of the obligee. *Mich.* 1718. *Turton* and *Benſon*, 2 *Vern.* 764. 1 *Will. Rep.* 496. *Preced. Chanc.* 522. S. C. 3 *Bac. Abr.* 690. *Lucas. Rep.* 445. S. C. *Poſt.* 83. *pl.* 2. S. C.

6. A ſeaman aſſigns his wages for ſecuring the payment of a debt due by ſimple contract; and by dying ſoon afterwards inteſtate, and leaving bond-debts, it was decreed that the aſſignee ſhould be paid only in a courſe of adminiſtration. *Mich.* 1700. *Mitchel* and *Edes*, 2 *Vern.* 391. Note; *The reaſon hinted at is, becauſe the agreement to aſſign amounted to no more than a letter of attorney to receive them, which was revoked by his death. Sed Quere of this caſe.* *Prec. in Chan.* 125, S. C.

7. For where a ſeaman aſſigned his wages as a ſecurity for money, and died indebted to other perſons, it was held that this aſſignment ſpecifically bound the wages, and that the money ſecured thereby ſhould be paid preferable to all other debts. *Mich.* 1707. *Crouch* and *Martin*, 2 *Vern.* 595.

8. An adminiſtrator *de bonis non* of the conuſee of a ſtatute, had agreed with the conuſor to aſſign it in conſideration of a ſum of money, which, upon the ſaid agreement, the conuſor had covenanted to pay him, his executors or adminiſtrators, and then the adminiſtrator died; and the court decreed the money to be paid to the executor of the adminiſtrator, and not to the adminiſtrator *de bonis non*, although before the extent it could not be aſſigned at law. 2 *Vent.* 362. The reporter adds a note, That there were no debts appearing of the firſt inteſtate's: If there had been debts, it would have belonged to the adminiſtrator *de bonis non*. 1 *Rol. Abr.* 380.

9. A man by his will gives a legacy of 300*l.* to a feme covert, without creating any ſeparate truſt of it for her benefit, and this legacy was made payable out of a reverſion of lands expectant on an eſtate for life; the huſband ſome time after makes an aſſignment of this legacy to truſtees, in truſt for the benefit of his children; and after by his will takes notice again of the ſame legacy, and deviſes it in like manner for the benefit of his children, and makes his wife executrix, and dies; the eſtate for life drops, and the widow applies to the executor of the firſt teſtator for her 300*l.* legacy; and thereupon ſhe and the executor come to an agreement, that ſhe ſhould accept 200*l.* only, in full of her ſaid legacy, and accordingly the 200*l.* was paid, and ſhe gave a releaſe for the whole legacy; and it appearing in the cauſe, that ſhe had notice both of the will and aſſignment, and that ſhe gave no manner of notice of it to the executor; the court decreed, that as the huſband had made good aſſignment of it in equity (though as a *choſe in action* it was not aſſignable by law) that ſhe ſhould be anſwerable to the children for the 200*l.* ſhe had received; but as to the 100*l.* *Gilb. Eq. Rep.* 88, S. C.

100*l.* which the executor had drawn her in to release, he himself should be chargeable, he being thereby no ways injured, since he ought at first to have paid the whole legacy; and though this legacy was charged on a reversion, which was not an immediate fund for the raising of it; yet being given to the wife *in præsenti*, when the fund comes in, it shall carry interest from the testator's death, which must likewise go to children. *Mich.* 1714. *Atkins* and *Dawbeny*. *But of what things of the wife's may the husband dispose, and when, vide* title *Baron and Feme.*

10. *A.* possessed of a term, settles it in trust to the use of himself and his wife for life, remainder to the use of such issue of the husband and wife, as he should by will appoint; he by will settles it on *B.* his son, who in the life-time of his mother assigns and releases it to *C.* to whom the trustees likewise assign their interest; and it was held by the court, with the advice of the judges, that though a grant of a future possibility is not good in law, yet a possibility of a trust in equity may be (*a*) good; and that it was the rather so in this case, because the trustees joined in it. 4 *Car.* 1. *Warmestry* and *Tanfield*, 1 *Chan. Rep.* 29.

(*a*) If there be a devise of a term to *A.* for life, remainder to *B. B.* cannot in the life-time of *A.* assign his interest, because but a possibility. 10. *Co.* 47. *Lampet*'s case, 1 *Sid.* 188, S. P.

11. Where any person has the trust of a possibility in remainder of a term, he has power to declare, and make a disposition of the trust of such possibility, agreed by counsel. 1 *Chan. Ca.* 8.

12. *Cestuy que Trust* of a term, upon his wife's joining with him in a sale of part of her jointure, directs, that after his and his wife's death, his trustees should assign the rest of the term to his wife's daughter, when she shall attain the age of twenty-one, or be married; the daughter marries, and she and her husband assign their interest in the term, in the life-time of *Cestuy que Trust* and his wife; and the question was, whether such a possibility could be assigned; and *per* Ld. K. It is a notion that has obtained at law, that a possibility cannot be assigned; yet if it were *res integra*, there is no reason for it; yet the rule of law must be the rule here, for *Æquitas sequitur Legem*; and he dismissed the plaintiff's bill, which sought the benefit of this assignment, but without costs. *Freeman* and *Thomas*, *Mich.* 1706. 2 *Vern.* 563. Called *Thomas* and *Freeman.*

(B) *The Privity of Contract or Estate being destroyed, what remedy Grantees or Assignees shall have against each other in Equity.*

1. IF *A.* leases to *B.* a wine-licence for years, rendering rent, and *B.* assigns to *C.* and *C.* for valuable consideration assigns to *D.* who had no notice of the rent, *A.* shall not charge *D.* with the rent, for the contract was personal, as in case of a lease of a fair, &c. and *Æquitas sequitur Legem*, especially when the assignee is a purchaser for valuable consideration, without notice. *Mich.* 1656. *James* and *Blank*, *Hard.* 88. But if he had been a purchaser,

purchaser, with notice, he would have been liable in equity during his enjoyment, though there was no privity. *Vide* 2 *Vern.* 423.

2. The plaintiff demands, by his bill, six years rent arrear, due from the defendant, and incurred during the time that he, the plaintiff, was bishop of *Exon*; the defendant pleads, that whilst he was bishop of *Exon*, he tendered him the rent, which he refused, having a mind to impeach his lease, and that he being now translated, is not intitled to the rent, either in law or equity. Ld. Chan. was clear of opinion, that the plaintiff had no remedy at (*a*) law; and with the advice of the judges decreed, that he should have none in equity. 23 *Car.* 2. *Bishop of Sarum* and *Nosworthy*, 2 *Chan. Rep.* 60.

(*a*) But *quære* whether an action of debt might not be brought for the rent at law. Probably the lease was for life, and then (at that time) no action of debt lay.

3. If an assignee of a lessee assigns it over, equity will compel him to pay the rent which became due during his enjoyment, tho' the privity of estate was destroyed in (*b*) law. It being urged, that there were twenty precedents of the kind; Ld. Chan. said, that if there were not one, he would not have doubted to have made a precedent in this case. *Pasc.* 1683. *Treakle* and *Cook*, 1 *Vern.* 165.

(*b*) An assignee cannot, by assigning his interest, discharge himself of the rent without tendering the arrears, and giving notice of the assignment; for till then he is liable in an action of debt. 1 *Lev.* 215. He is likewise liable in an action of covenant for the rent due before the assignment. 1 *Salk.* 81. But for the rent which became due after the assignment, he is not liable, though he does not give notice of the assignment. 1 *Salk.* 81. 2 *Vent.* 228.

4. If a lessee of a college makes an under-lease, and covenants with his lessee, that he would renew his lease, and add a further term of three years, to his lease, and he renews the lease; but instead of adding the three years, he assigns it to *J. S. J. S.* having notice of the covenant, will be obliged to add the three years. Decreed *Easter* 27 *Car.* 2. *Finch* and *Earl of Salisbury*, *Rep. Temp. Finch* 212.

5. So if *A.* makes a lease for three years, and in consideration of the Lessee's laying out 100*l.* in improvements, covenants to grant a new lease at the end of the term, at the same rent; the purchaser of the inheritance shall make good this covenant. *Mich.* 1703. *Richardson* and *Sydenham*, 2 *Vern.* 447.

6. If a lessee for years, with covenants to repair, assigns it to *J. S.* by way of mortgage, and *J. S.* never enters, equity will not compel him to repair, tho' he had the whole interest in him; and tho' it was his own folly to take an assignment of the whole term, when he should have taken a derivative lease, by which means he would not be liable at law. *Trin.* 1692. *Sparkes* and *Smith*, 2 *Vern.* 275. But *vide* 2 *Vern.* 374 where such an assignee, tho' he never entered, and had lost his mortgage-money, was by law compelled to pay the rent; and having sued in equity, could have no relief.

7. If a lessee for years, who is bound by covenant to repair, makes an under-lease in trust for *J. S.* and the lessee is dead, and the premisses out of repair; yet the lessor shall not compel *J. S.* in equity to repair, unless the executors of the first lessee are insolvent; for tho' the privity of estate is destroyed in law, yet he shall not have recourse to this remedy, whilst he has any left against the executors of the first lessee. *Mich.* 1682. *Goddard* and *Keate*, 1 *Vern.* 87. S. C.

CAP.

CAP. IX.

Award and Arbitrament.

(A) *Concerning the Submiſſion.*

(B) *The Parties to the Submiſſion.*

(C) *The Arbitrators or Umpire, and herein of the Commencement and Revocation of their Authority.*

(D) *The Award, for what Cauſes ſet aſide.*

(E) *Concerning Submiſſions and Awards made purſuant to a Rule of Court.*

(A) *Concerning the Submiſſion.*

1. IF two ſubmit themſelves to the arbitrament of *J. S.* of all controverſies, *Ita quod, &c. de præmiſſis*, and *J. S.* makes an award of part only, ſo that the award is void in law; this ſhall not be made good in a court of equity. *Robinſon* and *Biſs*, adjudged 7 *Jac. in B. R.* and a prohibition granted to the council of *York*. 1 *Rol. Abr.* 377.

2. So if the award differs from the ſubmiſſion, it ſhall be as well void in equity as at law. 1 *Chan. Ca.* 186. *Rep. Temp. Finch* 141, S. P.

3. If the ſubmiſſion to an award be (*a*) conditional *ita quod* an award be made *de & ſuper præmiſſis, &c.* there, if the award be not of the whole, it is void; but if the ſubmiſſion be not conditional as aforeſaid, then though the award be but of part of the matter referred, it is good for ſo much as it ſettles, though it leaves other things at large. *Per* Lord *Maynard*, 2 *Vern.* 109.

(*a*) The diſtinction which has obtained with reſpect to conditional ſubmiſſions, is where the ſubmiſſion does in general ſet forth all the matters in controverſy, with a ſpecial concluſion requiring, or ſo that the award be made of all the ſaid matters; in which caſe it has been held neceſſary to make a final determination of all the particulars enumerated. *Cro. Eliz.* 838. But if there be no ſuch enumeration, nor ſpecial concluſion, then the award may be good, though it makes an end of part of the matters only. 1 *Rol. Abr.* 257. 8 *Co.* 97. *b.* And ſince the courts of law and equity have of late been leſs nice in the conſtruction of awards; it is now agreed to be a ſtated rule in awards that are conditional, or ſaid to be *de & ſuper præmiſſis*, that if the words uſed in them be in their own nature more comprehenſive, and ſo extenſive to things not within the ſubmiſſion; yet it ſhall be intended, that there was no other matter between the parties for them to lay hold on, but what was ſubmitted, if the contrary be not ſhewn; ſo *è converſo*, If the words are more narrow and leſs comprehenſive than to take in all the matter of ſubmiſſion; yet it ſhall be intended, that no more was in controverſy than what the words naturally comprehend, if the contrary be not likewiſe ſhewn. 6 *Mod.* 232.

(B) *The Parties to the Submiſſion.*

1. IF all the parties to the ſuit conſent to refer the matter to *J. M.* and *J. S.* one of the parties, ſignifies his conſent by ſigning a paper to that purpoſe, ſo that the award be made at a certain day therein limited, and no award is then made; but afterwards the court, in the preſence of all the parties (except *J. S.* who was abſent) but his Solicitor conſenting on his behalf, refer it back to *J. M.* but not finally to determine, who made an award; and it was reſolved, that the Solicitor's conſent ſhould not bind his client; tho' it was objected and admitted, that an (*a*) Attorney's aſſent to a reference on behalf of his client ſhould bind him at law. *Colwell* and *Child*, 1 *Chan. Ca.* 86. 1 *Chan. Rep.* 195. *Colwell* and *Child.* 12 *Car.* 2. S. C. 2 *Freem.* 154.

(*a*) *Vid.* 1 *Salk.* 70. And who are bound by their own and other Submiſſions, *vide* 1 *Rol. Abr.* 268. *March* 111. *Stile* 351. 3 *Lev.* 17. If one partner, on behalf of himſelf and the other partner, ſubmits, &c. though the partner that did not ſubmit is not bound, yet he who ſubmitted ſhall perform the award. 2 *Mod.* 227.

2. If *A.* and B. executors of *J. S.* on the one part, and *C.* his widow, on the other part, ſubmit to arbitration, the arbitrators may make an award, not only of matters in difference between *A.* and *B.* jointly, or *A.* and *B.* ſeparately, and *C.* but alſo of matters between *A.* and *B.* provided they have knowledge of the whole fact, and all the parties intereſted are before them. *Carter* and *Carter*, 1 *Vern.* 259.

(C) *The Arbitrators or Umpire; and herein of the Commencement, Determination and Revocation of their Authority.*

1. IF the ſubmiſſion to an award be, ſo as the arbitrators make their award at or upon the 27th of *March* then next; and if the arbitrators make no award then, if the umpire make his umpirage on the ſame day; the umpire cannot make his umpirage on the ſame (*b*) day, though the arbitrators diſagree, for they have all that day to make their award. 2 *Vern.* 100.

(*b*) If there be a ſubmiſſion to two, ſo as they make their award before *Midſummer*: and if they cannot agree, then to ſuch Umpire as they chuſe, ſo as he makes his Umpirage before *Midſummer*; and an Umpire is choſe accordingly, this is good, and ſo will his Umpirage be, if made; becauſe the Arbitrators had determined their power before by chuſing an Umpire; but if the Umpire be named in the ſubmiſſion, he cannot make his Umpirage before the time given to the Arbitrators to make their award in be expired. *Per Holt* C. J. 1 *Salk.* 71, 72. But for this *vide Cro. Car.* 263. *Raym.* 206. 1 *Lutw.* 544. 2 *Mod.* 169. 2 *Vent.* 116. 1 *Salk.* 70.

2. If by the ſubmiſſion the arbitrators have power to chuſe an umpire, and they not agreeing, throw croſs and pile which of them ſhould name the perſon; and the umpire thus choſen makes his Umpirage; the court will ſet it aſide. 2 *Vern.* 485.

3. If the parties in court ſign an order, by conſent, to refer their matters to arbitrators finally to determine, and their award to be

final, and ſtand ratified by decree, without any appeal; yet one of the parties may (*a*) revoke this ſubmiſſion; but in ſuch caſe the court will grant an attachment againſt him. *Hide* and *Petit*, 1 *Chan. Ca.* 185.

(*a*) A ſubmiſſion to an award by bond may be countermanded by deed, ſuch authorities in their own nature being revocable, as a letter of Attorney, *&c.* though made irrevocable by expreſs words; but in ſuch caſe the bond is forfeited; but if it had been without obligation, one might revoke and forfeit nothing: *Ex nuda Submiſſione non oritur Actio.* 8 *Co.* 82.

(D) *The Award, for what Cauſes ſet aſide.*

1. UPON a ſubmiſſion, by conſent and order of court, an award was made, that a bond ſhould be given by the guardian, that the infant at his full age ſhould convey the lands in queſtion; and *Nottingham* L. C. held, that when the parties themſelves chuſe their own judges, this court will not relieve againſt the award, unleſs it be in caſe of corruption, exceeding authority, and the like; but when there is a reference by order of this court, and the award appears unequitable, the court will not decree it; and in this caſe, it being unreaſonable that the guardian ſhould give ſuch a bond, for the infant may die, or if he live to age, may refuſe to convey, and therefore would not decree it; and he ſaid further, that he would never decree an award to bind an infant. *Trin.* 28 *Car.* 2. *Cavendiſh* and ———, 1 *Chan. Ca.* 279.

2. If the arbitrators award a thing impoſſible, or repugnant, to be done, the award ſhall be ſet aſide. *Vide* 1 *Chan. Ca.* 87.

3. The plaintiff called the defendant, who was a butcher, *bankrupt knave*, which being ſubmitted to reference, the arbitrators gave him 495*l.* to repair his honour (as they called it in the award) and the court thought the damage too exceſſive, and ſet aſide the award, but directed a trial at law; and the jury gave him 10*l.* *Butcher of Croydon*'s caſe, 3 *Chan. Rep.* 76. 2 *Vern.* 251, S. C. cited; where it is ſaid, that the court did not ſet aſide the award barely for exceſſive damages, but becauſe it appeared that one of the referees was the butcher's couſin.

4. If tenant for life commits waſte to the value of 380*l.* and his eſtate is but 70*l.* *per ann.* and an action of waſte is brought againſt him by him in remainder, and it is ſubmitted to a reference by rule of court; but before an award made, the tenant for life repairs the places waſted to 40*l.* and forbids the arbitrators, and likewiſe the Umpire, to proceed in making any award; but notwithſtanding the Umpire awards the party 380*l.* Yet the court will not ſet aſide the award, there appearing no fraud or colluſion in the matter. *Paſc.* 1683. *Brown* and *Brown*, 1 *Vern.* 157. Although it was objected, that 380*l.* was near the value of an eſtate for life of 70*l.* *per ann.*

5. If the arbitrators appear to have an intereſt in the cargo touching which the award is made, and therefore put too great a value thereon; and in five days after the award made, the money awarded is attached by the arbitrators for debts owing to them; the court will ſet aſide the award. *Hil.* 1691. *Earle* and *Stocker*, 2 *Vern.* 251.

6. If a ſubmiſſion is to three arbitrators, or any two of them, and two of them by fraud or force will exclude the other, that alone

alone is ſufficient to vitiate the award; or if they have private meetings, and admit of one of the parties, but give no notice to the other, and ſuffer the party's attorney, whom they admitted, to draw up the award, ſuch award ſhall be ſet aſide for partiality and unfairneſs. *Mich.* 1705. *Burton* and *Knight*, 2 *Vern.* 514.

7. If it appears that the arbitrators went upon a plain miſtake, either as to the law, or in a matter of fact, the ſame is an error appearing in the body of the award, and ſufficient to ſet it aſide. 2 *Vern.* 705. But the plaintiff failing to make out his caſe by proof, his bill was diſmiſſed. *Comeforth*, *Verſus*, *Geer*.

8. The plaintiff and defendant had ſubmitted to an arbitrament by bond; and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant 900*l.* and to ſeal a releaſe to the defendant; and the defendant was to aſſign ſeveral ſecurities he had from the plaintiff. The plaintiff ſold ſome lands to raiſe the 900*l.* expecting the defendant would receive it; and he gave him intimation he would, and tendered him the 900*l.* and a releaſe executed by the plaintiff; and though there was no other execution on the plaintiff's part of the award; and though the award was extrajudicial, and not good in ſtrictneſs of law; yet Ld. Chan. decreed it ſhould be performed *in ſpecie*. *Paſc.* 1687. *Norton* and *Maſcal*, 2 *Vern.* 24.

* 9. But where a bill was exhibited to have an execution of an award, which was performed by neither party; and the defendant demurred, becauſe there was no precedent that a court of equity had ever carried ſuch awards into execution; and the demurrer was allowed. *Mich.* 1704. at the rolls, *Biſhop* and *Webſter*.

(E) *Concerning Submiſſions and Awards made purſuant to a Rule of Court.*

1. IF an award is made a rule of court, according to the ſubmiſſion for that purpoſe, and an attachment is taken out for not obeying the award, and then the party dies againſt whom the attachment iſſues; the (*a*) act of parliament directing it to be carried on by attachment, as it done in other courts, for diſobeying a rule of court; by the death of the party the attachment is gone, and the remedy loſt. *Mich.* 1703. *Webſter* and *Biſhop*, 2 *Vern.* 444. *Prec. in Chan.* 223. S. C.

(*a*) By the 9 & 10 *W.* 3. *cap.* 15. The parties may agree, that their ſubmiſſion to the Award, or Umpirage of any perſon or perſons, ſhall be made a Rule of any of his Majeſty's Courts of Record, and may inſert ſuch their agreement in the condition of their bond, &c. and a Rule of Court ſhall thereupon be made, that the parties ſhall be concluded by ſuch Arbitrament or Umpirage; and in caſe of diſobedience thereto, the party neglecting or refuſing ſhall be ſubject to all the penalties of contemning a Rule of Court, unleſs it appears on oath, that ſuch award was corruptly and unduly procured: in which caſe it ſhall be ſet aſide by any Court of Law or Equity, &c. *Provided* that this ſtatute ſhall extend only to ſuch matters for which there is no remedy, but by Perſonal Action or Suit of Equity.

2. If an award is made purſuant to an order of court, the party ought firſt to move the court to confirm the award, as is done upon a Maſter's Report, and either ſide is at liberty to except to it. 1 *Vern.* 469.

3. If there be a ſubmiſſion to a reference by order of court, and the award to be made to be confirmed by the decree of the court, without appeal or exception; yet exceptions to the award will be admitted; ruled upon debate. 2 *Vern.* 109.

CAP. X.

Bankrupt.

(A) *Concerning the Commiſſion and Commiſſioners.*
(B) *What ſhall be deemed the Bankrupt's Eſtate, or ſuch an Intereſt in him as the Commiſſioners may aſſign.*
(C) *Who may be allowed to come in as Creditors.*
(D) *Who are obliged to come in as Creditors.*

(A) *Concerning the Commiſſion and Commiſſioners.*

1. THE granting a commiſſion of bankruptcy is not a matter diſcretionary, but *de Jure*; for though the words of the Act of Parliament are, that the Chancellor may grant, yet that *may* was in effect *muſt*. *Per North* Ld. K. *Alderman Backwell's* caſe, 1 *Vern.* 152. And ſo he ſaid it had been reſolved by all the Judges.

2 But though the granting a Commiſſion be *ex officio*, yet it muſt be at the requeſt of perſons intereſted; for if twenty ſwear that *J. S.* is a bankrupt, yet a Commiſſion cannot be awarded without a petition for that purpoſe. *Per North* Ld. K. *(a) Backwell's* caſe, 2 *Chan. Ca.* 191.

(a) But *per Holt* C. J. If a man contracts a debt while he is a dealer, and after leaves off trade, and then commits an act of bankruptcy, there none of his creditors becoming ſo ſince he left off trade, can ſue out a Commiſſion, but if thoſe who were his creditors before he left off trade ſue out a Commiſſion, the other creditors may come in and join. *Hil.* 9 *W.* 3. *Meggott* and *Mills*, *Ca. in B. R. Temp. W.* 3. 159. *Vide* Lord *Raym. Rep.* 287. S. C. and S. P.

3. If all the creditors, who petitioned for a commiſſion, ſhould agree to have it diſcharged or ſuperſeded, it may be granted. 1 *Vern.* 209. *Per Jefferies* Ld. Chan. And if other creditors, who were not petitioners, ſhould pray a renewal of the Commiſſion, or a revocation of the *Superſedeas*; *Q.* if it may not be granted, eſpecially if the *Superſedeas* was within four months after the granting the Commiſſion. *Vide* 2 *Chan. Ca.* 192, 193. 1 *Vern.* 208.

4. If a Commiſſion is granted, and the bankrupt dies, yet the Commiſſioners may proceed. 2 *Chan. Ca.* 193.

5. If the King dies the Commiſſion abates, but a new Commiſſion may be taken out, and the Commiſſioners ſhall proceed from where they left off. 2 *Chan. Ca.* 193.

6. If

6. If a creditor offers proof of his debt to the Commiſſioners, which they diſallow, and diſtribution is not made, Ld. Chan. will hear the proof, and give order therein; though he ſaid at firſt, that it was fit to leave it to the courſe the ſtatute had provided. 1 *Chan. Ca.* 275.

7. If one is examined by the Commiſſioners touching the bankrupt's eſtate; yet he may be re-examined in Chancery. 1 *Chan. Ca.* 73.

8. If the Commiſſioners make a fraudulent diſtribution of the bankrupt's eſtate, it may be ſet aſide in Chancery, even on a petition. *Per Trevor* and *Hutchins* Lds. Commiſſ. 2 *Vern.* 162.

9. But it ſeems a diſtribution by the Commiſſioners among the creditors, upon a ſuppoſed value of the bankrupt's real eſtate, where the Commiſſioners had no money to diſtribute, is not fraudulent, and not to be ſet aſide. *Vide* 2 *Vern.* 158.

(B) *What ſhall be deemed the Bankrupt's Eſtate, or ſuch an Intereſt in him as the Commiſſioners may aſſign.*

1. IF a leſſor covenants with his leſſee and his aſſigns, to renew his leaſe, and the leſſee becomes a bankrupt, and the Commiſſioners aſſign this covenant, the aſſignee cannot have any relief againſt the leſſor: adjudged upon a reference to J. *Windham* and B. *Turner*; and the bill of the aſſignee diſmiſſed accordingly. *Hil.* 17 *Car.* 2. *Drake* and *The Mayor of Exeter*, 1 *Chan. Ca.* 71. 2 *Vern.* 97, S. C. cited *per Cur'*, as ſo adjudged, *Pl.* 89. *Vide* alſo 2 *Vern.* 194, *Pl.* 176. 2 *Freem.* 183. S. C. and S. P. determined.

2. But the Commiſſioners may aſſign an equity of redemption. 1 *Chan. Ca.* 71. 2 *Vern.* 97, S. P. cited *per Cur'*, and ſays, that *it was for ſome time doubted*, the clauſe in the ſtatute being, that the aſſignee may perform conditions not broken, and conditions performable.

3. If *A.* deviſes 800*l.* to be inveſted in lands, for the benefit of the wife of *J. S.* for her life, and afterwards for her children; and the intereſt of the money in the mean time to go to ſuch perſons as ought to receive the profits, and *J. S.* becomes a bankrupt, the intereſt of this 800*l.* ſhall not be liable to the bankruptcy, this not being any truſt created by the bankrupt, but a maintenance intended the wife, and given to her by her relation. *Paſc.* 1689. *Vandenanker* and *Deſbrough*, 2 *Vern.* 96.

4. If the father, on his ſon's marriage, covenants during his life to pay his ſon 15*l. per ann.* and the ſon becomes a bankrupt, his creditors ſhall not have the benefit of this agreement. *Mich.* 1690. *Moyſes* and *Little*, 2 *Vern.* 194.

5. But if a father deviſes a legacy of 600*l.* to his ſon, payable at twenty-one, and the ſon obtains a decree for it, and 637*l.* is reported due; but before the money is paid, the ſon becomes a bankrupt; yet the Commiſſioners may aſſign the legacy and benefit of the decree; ruled upon a demurrer. *Hil.* 1701. *Toulſon* and *Grout*, 2 *Vern.* 432.

*6. A man had deviſed lands, which were in mortgage, to be ſold, and the ſurplus of the money to be paid to his daughter; the daughter married a man, who ſoon after became a Bankrupt, and the Commiſſioners aſſigned this intereſt of the wife's; the huſband died, and the aſſignees brought this bill againſt the wife and truſtees, to have the land ſold, and the ſurplus of the money paid to them; but the Court would not aſſiſt in ſtripping the wife (who was wholly unprovided for) of this intereſt, but diſmiſſed the bill. *Mich.* 1698. at the rolls, *Parker* and *Dykes*.

1 *Will. Rep.* 382, S. C. and ſays, the Bill was diſmiſſed without Coſts, becauſe the Plaintiffs were Creditors. *Vide Gilb. Eq. Rep.* 140, S. C. 3 *Bac. Abr.* 485. S. C.

7. A legacy of 1000*l.* was given to one after the death of her mother, when ſhe ſhould attain the age of twenty-one years; and the defendant was appointed Truſtee for the raiſing and Payment thereof out of certain lands; the legatee was drawn into an improvident match with one, who ſoon after became a Bankrupt, and the Commiſſioners aſſigned all his effects, and gave him a certificate of his conformity; and the aſſignees brought a bill againſt the truſtee for his 1000*l.* who inſiſted, that the aſſignees could be in no better condition than the huſband; and that if he were plaintiff he could not prevail, without making a ſuitable proviſion on his wife; and that this legacy being liable to a double contingency, *viz.* the death of the mother, and the legatee's arriving at the age of twenty-one years, at the time of the Bankruptcy, was not ſuch an intereſt as could be aſſigned: The Court held, that though both contingencies have ſince happened; yet thoſe being ſince the aſſignment of the Bankrupt's eſtate, and ſince a certificate of his having conformed himſelf in every thing to the acts, he was now diſcharged as a Bankrupt; and this portion could not paſs without a new aſſignment, which the Commiſſioners could not make, their Commiſſion being determined, and ſo diſmiſſed the bill. *Mich.* 1717. *Jacobſon* and *Peere Williams*.

(C) *Who may be allowed to come in as Creditors.*

1. IF one lends money to a Bankrupt, after a Commiſſion ſued out againſt him, but before actual notice of it, he cannot come in under the ſtatute as a creditor: By two Lords Commiſſioners againſt one. 2 *Vern.* 156. A debt voluntarily paid a Bankrupt ſhall be paid over again; *ſecus* if recovered by due courſe of law. 1 *Vern.* 94. *But for this vide* title *Notice*.

2. *A.* on his marriage gives a bond to leave his wife 500*l.* or a third of his perſonal eſtate, at her election; *A.* becomes a Bankrupt; and it was decreed, that the wife ſhould come in as a creditor on her bond; and what ſhall be paid in reſpect thereof, to be put out to intereſt, which is to be received by the creditors during the Bankrupt's life, and the principal to be paid the wife, if ſhe ſurvives him. *Trin.* 1710. *Holland* and *Calliford*, 2 *Vern.* 662.

2 *Will. Rep.* 497, S. C.

3. But where a bond was given by the huſband, for payment of a ſum of money to his wife, in caſe ſhe ſurvived him, and the huſband after became a Bankrupt: And *per* Ld. Chan. there can be nothing ſtopped, by way of dividend, out of the Bankrupt's eſtate,

to

to anſwer this contingent debt or demand, when it happens; but where a (*a*) Bottomree-bond was entered into, and the ſhip returned ſafe before the dividend actually made, they were let into a ſhare of that dividend, though the bond was contingent at firſt, becauſe the contingency was then at an end. *Mich.* 1728. *Ex parte Chawell* verſus *Caſſanet*.

(*a*) *Vid.* 19. *Geo.* 2 *Brit. Stat.*

4. *A.* and *B.* enter into partnerſhip, and by indenture of copartnerſhip agree, that all ſuch debts as ſhould be owing on the joint account, ſhould be paid out of the joint-ſtock, and that the joint-ſtock ſhould not be charged with the private or particular debts of either of the ſaid partners. *A.* and *B.* became Bankrupts, and a joint-commiſſion was taken out againſt them; and the Commiſſioners having aſſigned all their eſtate to the creditors on the joint-ſtock; *J. S.* who was a ſeparate creditor to one of them, brought his bill to be admitted into a ſhare; and it was declared by the court, that the eſtate belonging to the joint-trade, as alſo the debts due from the ſame, ought to be divided into moieties, and that each moiety of the eſtate ought to be charged, in the firſt place, with a moiety of the joint-debts; and if there be enough to pay all the debts belonging to the joint-trade, with an overplus, then ſuch overplus ought to be applied to pay particular debts of each partner; but if ſufficient ſhall not appear to pay all the joint-debts; and if either of the partners ſhall pay more than a moiety of the joint-debts, then ſuch partner is to come in before the Commiſſioners, and be admitted as a creditor for what he ſhall ſo pay over and above his moiety; and decreed accordingly. 34 *Car.* 2. *Lord Craven & al'* and *Knight & al'*, 2 *Chan. Rep.* 226. 2 *Chan. Ca.* 139, S. C. *Lord Craven* and *Widdows*, *Eaſter* 35 *Car.* 2. and only there ſaid, that the ſeparate creditor was admitted, notwithſtanding the agreement of the parties. *A* Quære *is added*, *How the ſeparate Creditors could have other title than thoſe under whom they claim?*

5. *A. B.* and *C.* were partners in the trade of a dry Salter; *C.* imbezles and waſtes the joint-ſtock, contracts private debts, and becomes a Bankrupt; the Commiſſioners aſſign the goods in partnerſhip; on a bill brought by the other partners, they inſiſted to have an account, and the goods ſold, that out of the produce of the goods, the debts owing by the joint-trade might be paid in the firſt place; and that out of *C.*'s ſhare ſatisfaction may be made for what *C.* waſted; and that the Aſſignees could be in no better caſe than the Bankrupt himſelf, and were intitled only to what his third part would amount unto clear, after debts paid and deductions for his imbezlement; and the court ſeemed to be of that opinion, but ſent it to a maſter to take the account and ſtate the caſe. *Trin.* 1693. *Richardſon* and *Goodwin*, 2 *Vern.* 293.

6. *A.* and *B.* being joint-traders, a Commiſſion of Bankruptcy iſſued againſt them; their ſeparate creditors now applied by petition, than they might be let in for their debts, upon the reſpective ſeparate eſtates of the Bankrupts, under that joint-commiſſion, the ſeparate eſtates being of ſmall value, and would not bear the charge of taking out two new Commiſſions againſt them ſeparately; and Ld. Chan. ordered them to be let in to prove their reſpective ſeparate debts upon the joint-commiſſion, they paying contribution to the charge of it, and directed, as the joint or partnerſhip eſtate was in the firſt place to be applied to pay the joint or partnerſhip debts, ſo

in

in like manner the ſeparate eſtate ſhould be in the firſt place to pay all the ſeparate debts; and as ſeparate creditors are not to be let in upon the joint-eſtate, until all the joint-debts are firſt paid; ſo likewiſe the creditors to the partnerſhip ſhall not come in, for any deficiency of the joint-eſtate, upon the ſeparate eſtate, until the ſeparate debts are firſt paid. *Mich.* 1715. *Ex parte Crowder*, 1 *Vern.* 706.

(D) *Who are obliged to come in as Creditors.*

Vid. 1 *Eq. Abr.* 143. *pl.* 14. 2 *Vern.* 281. Where *A.* purchaſes land and remortgages to *B.* the Vendor for part and gives a note for 200*l.* remainder of the purchaſe money; *A.* deviſes his lands for payment of debts, not leaving ſufficient aſſetts; decreed *B.* to come in only as Creditor by note and not as one who has a charge in equity on the lands. *Qu.* Had there been no note if the debt had not been an equitable charge on the lands, as in this caſe. And if his own alteration of the ſecurity was not the cauſe of the difference between this, and that decree.

1: IF *A.* ſells land to *B.* who afterwards becomes a bankrupt, and part of the purchaſe-money is not paid, *A.* ſhall not be bound to come in as a creditor, under the ſtatute, but the land ſhall ſtand charged with the money unpaid, though no agreement for that purpoſe. *Chapman* and *Tanner*, 1 *Vern.* 267.

2. If *A.* being beyond ſea, conſigns goods to *B.* then in good circumſtances in *London*, and before the goods arrive *B.* becomes a bankrupt, whereupon *A.* conſigns them to another; and the aſſignees of the Commiſſion pray relief, and a diſcovery; and a trial at law is directed, whether ſuch conſignment veſted a property in *B.* and a verdict is found for the aſſignees; yet equity will not oblige them to come in as creditors, it being allowable by any means to prevent the goods coming into the hands of *B.* or the aſſignees. *Hil.* 1690. *Wiſeman* and *Vandeput*, 2 *Vern.* 203.

CAP.

CAP. XI.

Baron and Feme.

(A) *What Things are veſted in the Huſband by the Marriage.*

(B) *What Acts of the Wife's before Marriage ſhall the Huſband avoid, as done in Derogation of the Rights of Marriage,*

(C) *How far the Huſband ſhall be bound by the Wife's Acts before Marriage.*

(D) *How far by her Acts during Coverture.*

(E) *How far a Feme Covert ſhall be bound by the Acts in which ſhe was joined with her Huſband.*

(F) *What Contracts between Huſband and Wife are diſſolved by the Marriage.*

(G) *In what Caſes the Huſband muſt make a ſuitable Proviſion on his Wife, when he ſues for her Fortune.*

(H) *Suits and Proceedings by and againſt Huſband and Wife, how to be.*

(I) *Concerning the Wife's Pin-money and Paraphernalia.*

(K) *Concerning Alimony and ſeparate Maintenance.*

(L) *What Right ſurvives to either of them by the Diſſolution of the Marriage.*

(A) *What Things are veſted in the Huſband by the Marriage.*

A Feme Sole having aſſigned her term in truſt for her herſelf, before marriage, the huſband alone mortgages the term; and it was decreed, that ſuch mortgage was not good; and it was likewiſe admitted by the Court to be the conſtant practice, ſince Queen *Elizabeth's* time, to ſet aſide and fruſtrate all incumbrances and

and acts done by the husband, with respect to the wife's term, in trust for her, and that he could neither charge nor grant it. *Per Finch* Ld. K. 25. *Car.* 2. *Doyly* and *Perfull*, 1 *Chan. Ca.* 225. *But the law is now changed in this particular.*

2. For where *A.* having disposed of a term settled in trust on his wife by a former husband; though it was decreed void by *Finch* Ld. K. yet upon an appeal to the House of Lords, the decree was reversed. Sir *Edward Turner's* case, 1 *Vern.* 7.

3. It came afterwards in question, upon an assignment made by the husband of such a term, whether he could dispose of it; and it being urged, that it had been lately adjudged in the House of Lords that he might, Ld. Chan. wondered at that resolution, which he said would not amount to an Act of Parliament, so as to change the law; but at last decreed such disposition good, saying, there must not be one kind of equity above stairs, and another here; and thought that from henceforth it would not be sufficient to have the husband's consent and privity to an assignment of a term in trust for the Feme, before marriage, unless he was likewise made a party to the assignment. *Mich.* 1681. *Pit* and *Hunt*, 1 *Vern.* 18.

4. A term being settled in trust on the wife by a former husband, the second husband first mortgages it, and then he and the mortgagee assign it to *J. S.* who brought a bill against the wife and her trustees, to have the legal estate assigned over to him; and it was held, that the husband may as well dispose of a term in trust for the wife, as if the legal estate was in her; and decreed accordingly, although the husband had made no settlement on the wife. *Trin.* 1692. *Tuder* and *Samyne*, 2 *Vern.* 270.

*5. *A.* made a settlement, whereby he created a term for years in trust to raise 400*l.* a-piece for his two daughters; one of them marries *B.* and he and his wife brought a bill, and had a decree to have the 400*l.* raised and paid; but before it was raised *B.* assigns the benefit of this decree to one *J. S.* in trust for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided; the creditor brought a bill to have the benefit of the said assignment; and though it was insisted upon, in behalf of the wife, that there was a difference between a term in trust to raise a sum of money for a woman, and a trust of the term itself for a woman; yet the Master of the Rolls held, that this was a term for years, and not a sum of money, and therefore not to be distinguished from Sir *Edward Turner's*, and must decree it (though against his conscience) that there may be an uniformity of judgments. *Trin.* 1703. *Walter* and *Saunders*. *But for this* vide *Letter* (L).

6. If a legacy be given to a Feme Covert, who lives separate from her husband, and the executor pays it to the Feme, and takes her receipt for it; yet on a bill brought by the husband against the executor, he shall pay it over again, with interest; for payment to the wife is not good. Decreed *Mich.* 1684. *Palmer* and *Trevor*, 1 *Vern.* 261.

7. *A.* devises the surplus of his personal estate to his daughter, the wife of *B.* for her separate use, and makes her executrix; and Ld. Chan. seemed to be of opinion, that the devise being to her,

1 *Will. Rep.* 125, S. C. no Decree appears to have been made.

Sed. Vid. 2 Will. Rep. 316. 2 Equ. Abr. 114. pl. 5. this point settled in favour of the wife, in the case of *Bennet and Davis.*

d not to truſtees, that what comes to her by law belongs to the uſband; but there was no decree made in it. *Trin.* 1710. *Har-*
ey and *Harvey*, 2 *Vern.* 659.

(B) *What acts of the wife's before marriage ſhall the huſband avoid, as done in derogation of the rights of marriage.*

Vid. the caſe of King & Cotton, & ECont'. 2 Will. rep. 358, 606. relative to the point in caſ. 5. of this page, & this ſubject in general.

A Widow makes a deed of ſettlement of her eſtate, and marries a ſecond huſband, who was not privy to ſuch ſettlement; and it appearing to the court, that it was in confidence of her having ſuch eſtate that the huſband married her, the court ſet ide the deed as fraudulent. *Howard* and *Hooker*, 2 *Chan. Rep.* 81.

2. So where the intended wife, the day before her marriage, entered privately into a recognizance to her brother, and it was decreed to be delivered up, and a perpetual injunction granted. *Lance* d *Norman*, 24 *Car.* 2. 2 *Chan. Rep.* 79.

3. So where a conveyance was made by the wife, before her rriage, to truſtees, in truſt that they ſhould permit her to reive the rents and profits of the eſtate, and act in every thing ſhe, whether ſole or Covert, ſhould appoint; the lady being zed in her underſtanding endeavoured to run away from her huſnd, and ſtirred up her creditors to ſue him; and the conveyance pearing to be without the huſband's privity, Ld. Chan. held it to in derogation of the rights of marriage, and decreed the poſſion of the eſtate to the huſband, and a conveyance from the ſtees to the ſix clerks, that it might be ſubject to the order of court. *Hil.* 1686. *Carlton* and *Earl of Dorſet*, 2 *Vern.* 17.

4. A woman, on agreement before marriage with her huſband, ng to have a power to act as a feme ſole, and the huſband ng, and ſhe marrying again, the ſecond huſband not being privy the ſettlement on the firſt marriage; it was decreed that the ond huſband ſhould not be bound by that ſettlement made on former marriage. *Edmonds* and *Dennington*, a caſe cited to be reed, 2 *Vern.* 17.

5. But where a widow, before her marriage with a ſecond huſd, aſſigned over the greateſt part of her eſtate to truſtees, in t for children by her former huſband; and though it was ſted, that this was without the privity of the huſband, and e with a deſign to cheat him; yet the court thought that a ow may thus provide for her children, before ſhe put herſelf er the power of a huſband; and it being proved, that 8000*l.* thus ſettled, and that the huſband had ſuppreſſed the deed, he decreed to pay the whole money, without directing any acnt. *Mich.* 1689. *Hunt* and *Mathews*, 1 *Vern.* 408.

Vid. Supra in M. S.

(C) *How*

(C) *How far the husband shall be bound by the wife's acts before marriage.*

1 *A.* Made a settlement of lands for the payment of his debts, and the trustees never acting, his wife after his death enters and takes the profits, and marries again, and she and her husband continue to take the profits; and he likewise dying, she marries another, who also continues to take the profits; and a creditor being unsatisfied, it was decreed by the master of the rolls, that the last husband should answer, not only for the profits received by himself and wife whilst sole, but likewise for what was received by the second husband, and not the heir at law: and of the same opinion was Ld. Chan. *Gilpin* and *Smith*, 1 *Chan. Ca.* 80. *But he referred it to the parties to moderate the matter.*

2. If a man marries an executrix, he shall answer for so much of the personal estate as she possessed, although he took it as a portion with her; and this not only in favour of creditors, but likewise of an heir. *Pasc.* 1688. *Bachelor* and *Bean*, 2 *Vern.* 61.

3. But if a feme administratrix wastes the assets, and then marries, and dies, the husband is liable to no more than the value of what came to his or his wife's hands after the marriage. Decreed *Mich.* 1689. *Sanderson* and *Crouch*, 2 *Vern.* 118.

Max. It is equity, that should make satisfaction, which received the benefit. (*a*) But where there is no such fund, out of which to make satisfaction chargeable with

4. If the first husband and wife are guilty of a *devastavit*, and there is a bond-debt due: *Per Cur'*, This makes such a lien by the deed, that the second husband is bound; but where there is barely a breach of trust, or a debt by simple contract, there, in equity, the plaintiff ought to follow the (*a*) estate of the wife in the hands of the executor of the first husband. *Hil.* 1684. *Norton* and *Spring*, 1 *Vern.* 309.

for the breach of trust, the second husband must pay it, and take his wife that as well as other debts. *Vide Gilpin* and *Smith*, *ut supra.*

5. A feme sole bought goods, but did not pay for them, and afterwards married, and dying, the goods came to the husband's hands; the creditor who sold the goods, brought a bill against the husband for a discovery; to which the husband demurred; and the demurrer was over-ruled by Ld. Chan. who with some earnestness said, he would change the law in that point (*b*). 25 *Car.* 2. *Freeman* and *Goodman*, 1 *Chan. Ca.* 295. *Vide* 1 *Will. Rep.* 465.

(*b*) In this case the goods never coming to the husband's hands till after the death of the wife, made it a very hard case upon the creditor, and probably occasioned the saying of Lord *Nottingham*; but even here he only over-ruled the demurrer put into a bill for discovery of the goods; and it does not afterwards appear, what afterwards became of the cause: *Per Talbot* C. in the case of *Heard* and *Stanford*, *Hil.* 1735. *Ca. in Eq. Temp. Talbot* 173.

* 6. But it has been since held, that where a man married a woman trader, who died, and at her death was indebted to several persons for wares which she had bought of them, and which were by her in *specie* at the time of her death, and came to the hands of her husband; that though a bill be brought against him, that he may either pay for those goods, or let the persons have them again, yet he may insist, that he is neither executor nor administrator to his wife, and therefore not liable to her debts, and that all her goods belong to him by law; ruled upon demurrer. *Trin.* 17[illegible] *Blackmore* and *Ley*; but *quære.*

Preced. Chan. 256. S. C.

* 7. The defendant had married an administratrix to her former husband, to a share of whose personal estate the plaintiff was intitled: the administratrix was likewise intitled to a third, and before her second marriage had wasted great part of the estate, and the

ied; and this bill was brought againſt her huſband, to have an ccount of the eſtate, and a ſatisfaction for his ſhare; and being eard at the rolls, an account was decreed to be taken of what of he eſtate had come to the hands of the adminiſtratrix before her econd marriage; and the plaintiff to have a ſatisfaction againſt the efendant abſolutely, for ſo much as came to his or his wife's hands fter marriage, and for what came to her hands before her ſecond arriage, to have ſatisfaction againſt the defendant, ſo far as he had ny eſtate of his wife's; and this decree was affirmed by Ld Chan. a) *Paſc.* 1706. *Powell* and *Bell*; and it was ſaid to have been ſe- eral times held, that where a man marries a woman, without ipulating for any particular fortune, or making any ſettlement; after the death of the wife debts of hers appear, the huſband ot being a purchaſer, in ſuch caſe ſhall be anſwerable for the ebts of the wife in equity, as far as he had any money, or other erſonal eſtate of hers. (*b*).

(*a*) In this caſe it did not appear what the wife had in her own right, and what as adminiſtratrix of her huſband, in which caſe the marriage reaſon only are

e is no gift in law of the goods, which ſhe hath in *auter droit*: And upon this unded all the caſes, where a ſurviving huſband has been charged with his wife's debts after death. *r Talbot* C. in the caſe of *Heard* and *Stanford*, *Hil.* 1735. *Ca. in Eq. Temp. Talbot* 175. (*b*) *Sed vide q. Ca. Abr.* Part 2. *Heard* and *Stafford*. and 3 *Will. rep.* 409 S. C.

(D) *How far by her Acts during Coverture.*

THE wife received money due on a bond entered into by one to her huſband; ſhe uſually received and paid money r him; and the huſband having got judgment on the bond, he as ordered to acknowledge ſatisfaction thereupon. 15 *Car.* 2. *Sea- urn* and *Blackſtone*, 1 *Chan. Ca.* 38. 2 *Freem.* 178, S. C.

2. Several goods were deviſed to *A*'s wife for life, and after her ceaſe to *B*. In this caſe, though *A*. and his wife were parted, d there had been great ſuits for alimony; and ſhe, during the paration, had waſted the goods; yet the Ld. *K*. thought it rea- nable, that the huſband ſhould be charged for this converſion of e wife's, *B*.'s title being paramount the feme's, and not under r. *Hil.* 1682. *Lord Paget* and *Read*, 1 *Vern.* 143.

3. If the wife, whilſt ſhe lives ſeparate from her huſband, and s a ſeparate maintenance, buys goods of tradeſmen who know the ſeparation and maintenance, they cannot ſue the executors of e huſband for theſe goods, neither will equity give the executors y relief, becauſe they have a very good defence at law. *Mich.* 82. *Ferrars* and *Ferrars*, 1 *Vern.* 71.

(E) *How far a feme covert ſhall be bound by the acts in which ſhe has joined with her huſband.*

IF a man ſeiſed in tail, for valuable conſideration, bargains and ſells to another in fee, and covenants that he and his wife ll levy a fine for better aſſurance; and it is agreed, that 30*l*. rt of the conſideration-money, ſhall be paid unto the feme upon e conuzance of the fine by the baron and feme; and after the ron and feme acknowledge a fine before a judge in the circuit, the vacation; and the ſaid 30*l*. is paid to the feme, the baron ing ſick a-bed, and the baron dies before the term, and thereupon e feme ſtops paſſing the fine, and after brings a writ of dower; the

Vid. 2 Equ. Abr. 145. pl. 4. which ſeems Cont' in effect to Caſ. 2 & in favor of Caſ. 1.

the bargainee ſhall have no remedy in equity againſt the dower, becauſe it is againſt a maxim in law, that a feme covert ſhould be bound without a fine. *Mich.* 5 *Car.* 1. *Hody* and *Lun,* 1 *Rol. Abr.* 375. but *quære.*

2. For if a feme covert, by agreement made with her huſband, is to ſurrender or levy a fine, though the huſband die before it be done, the court will, by decree (*a*), compel the woman to perform it. *Per Cur'*, *Baker* and *Child*, 2 *Vern.* 61.

(*a*) Upon looking into the Regiſter's minutes it appeared, that the court made no decree in it; but it was by conſent referred to Mr. Serj. *Rawlinſon*, for his arbritration. Mr. *Murray*, in the Caſe of *Thayer* and *Gould*, before Ld. Chan. *Mich.* 13 *Geo.* 2.

3. If Baron and Feme levy a fine of the wife's land, to enable them to take up the ſum of 400*l.* and they make a mortgage for it, and after the mortgage is forfeited, the huſband pays in part of the mortgage-money, but afterwards borrows as much more of the mortgagee, as he had paid in before; the mortgagee having the eſtate in law in him by the forfeiture of the mortgage, ſhall hold the land againſt the heir of the wife, until the whole money is paid; and if the heir will not pay principal, intereſt and coſts, he muſt be foreclоſed, Decreed *Paſc.* 1682. *Reaſon* and *Sacheverell*, 1 *Vern.* 41.

4. The Earl of *Huntingdon*, and the Counteſs *Eliz.* his firſt wife the mother of the preſent Earl, join in a mortgage of her inheritance for 4500*l.* to pay for the place of Captain of the Band of Penſioners, and ſubject to the mortgage, which was for a term of years; the eſtate was ſettled to Counteſs *Eliz.* for life, remainder to the now plaintiff, her ſon, in tail; and the late Earl, in the mortgage-deed, covenants to pay the money; and the proviſo was, that on payment of the mortgage-money the term was to ceaſe; the mortgage was ſeveral times aſſigned, and particularly in 1683, and the Counteſs joined in it; and there the proviſo was that on payment of the money by them, or either of them, the mortgage-term was to be aſſigned, as they, or either of them, ſhould direct or appoint. The mortgage bore date *Aug.* 1, 1682, on the 5th of the ſame *Auguſt*, the late Earl by letter thanked the Counteſs for having ſealed the mortgage; and added, that the profits of the office ſhould be religiouſly applied to pay off the incumbrance; but yet afterwards, when money came to be paid in, he paid off the mortgage, but took an aſſignment thereof in truſt for himſelf, and by will deviſed his perſonal eſtate to the defendant the Counteſs, his ſecond wife, and the benefit of this mortgage. The plaintiff's bill was to have the mortgage aſſigned to him; but Ld. K. declared, he could not decree for the plaintiff, but upon the uſual terms of redemption, on payment of principal, intereſt and coſts, diſcounting profits; but upon appeal to the Lords the plaintiff obtained a decree to have the mortgage aſſigned to him. *Paſch.* 1702. between the *Earl* and *Counteſs of Huntingdon*, 2 *Vern.* 437.

1 *Will. Rep.* 264, S. C.

5. If the wife joins with her huſband in a fine, to raiſe 400*l.* by mortgage of her own eſtate, to buy a place for her huſband; and the huſband dies, this ſhall be conſidered as a debt due from the huſband, and ſhall be paid out of his perſonal eſtate, if there be enough to pay all his other debts. *Mich.* 1714. *Tate* and *Auſtin*, 2 *Vern.* 689.

6. If a man marries a woman, who has a jointure in ſome hou[ſe]

which are burnt down, and they, on a fine levied by them of the houſes, borrow 1500*l.* to rebuild them, and by deed between the huſband and conuſee only, the equity of redemption is reſerved to the huſband and his heirs, and he lays out 3000*l.* in building; the wife, ſhe being no party to the deed, by which the redemption was reſerved to the huſband, ſhall redeem, and not the heir of the huſband. Decreed by *Nottingham* L. C. and affirmed by *North* L. K. *Hil.* 35 *Car.* 2. *Brend* and *Brend*, 1 *Vern.* 213.

7. If a feme covert agrees to ſell her inheritance, ſo as ſhe might have part of the money, and the land is ſold, and her part of the money is put into truſtees hands; this money ſhall not be liable to the huſband's debts, altho' ſhe afterwards agreed it ſhould be liable. Decreed between *Rutland* and *Molineux*, 2 *Vern.* 64.

(F) *What contracts between huſband and wife are diſſolved by the marriage.*

1. IF the huſband and wife by deed agree before marriage, that the wife ſhall have power to diſpoſe of her eſtate as ſhe pleaſes, during the coverture, and the deed is put into the hands of *J. S.* her former agent, who, during the coverture, pays the rents and profits to the huſband, with the wife's approbation, *J. S.* ſhall not be anſwerable for what he had received and paid to the huſband during coverture; for the agreement being between the huſband and wife only, it determined by the marriage. Decreed *Paſc.* 15 *Car.* 2. between *Darcy* and *Chute*, 1 *Chan. Ca.* 21. *But Q. of this reaſon.*

2. An agreement was made between the huſband and wife, and others on her behalf, before marriage, that ſhe ſhould diſpoſe of her goods, *&c.* as ſhe pleaſed; and the huſband dying, the queſtion was, whether they belonged to her, or ſhould go to the executors of the huſband, the marriage being an extinguiſhment of the agreement; but there is no reſolution. 1 *Chan. Ca.* 117. 1 *Vern.* 408, S. P. But no reſolution; and the covenant or agreement there ſaid to be with the intended wife only.

3. A man entered into articles with his intended wife, to ſettle certain lands on her, *&c.* the marriage is ſolemnized, and the huſband died before any ſettlement made; yet it was decreed, that the heir of the huſband ſhould execute the agreement, though it was urged, that the marriage was a waver of the benefit of it, and a releaſe in law. *Mich.* 30 *Car.* 2. *Haymer* and *Haymer*, 2 *Vent.* 343.

4. The plaintiff being executrix and reſiduary legatee of her former huſband, lends 100*l.* to *A.* and *B.* and took a note for it in her own name, and a bond in a truſtee's name, and after marries *B.* one of the obligors; and it was held, that the bond was not extinct. *Paſc.* 1693, *Cotton* and *Cotton*, 2 *Vern.* 290. *Prec. in Chan.* 41, S. C.

5. A man entered into a bond, conditioned to leave his intended wife 1000*l.* the huſband mortgages his eſtate, and died; and it was decreed, that though the bond was by law void, being extinguiſhed by the marriage, yet it ſhould be made good in equity; and that the wife may redeem and hold the land till ſhe was ſatisfied her debt. *Hil.* 1704. *Acton* and *Pierce*, 2 *Vern.* 480. *Prec. in Chan* 237, S. C. under the Name of *Acton* and *Acton.*

The bond ſeems not to have been adjudged void at law, but Cont' by two Judges againſt Holt. C. J.

Salk. 325.
Carth. 511.
L. Raym. 515. } S. C. at Law.

(G) *In*

(G) *In what caſes the huſband muſt make a ſuitable proviſion, when he ſues for her fortune.*

1. A Man ſued in the ſpiritual court for his wife's portion, and the court of Chancery granted an injunction to ſtay proceedings till ſuch time as he had made a competent jointure (a). *Toth.* 114.

(a) Whenever a man marries a ward of the court without the conſent of the court, the court will let the huſband have no benefit of the portion, till he makes a ſuitable ſettlement. *Mich.* 12 *Geo.* 2. *Phipps* and *Sheldon*, MS. Rep.

2. So where *A.* married the legatee and executrix of *J. S.* and, together with his wife, demanded 200*l.* due by bond to the teſtator; the defendant confeſſed the debt, but inſiſted, that the huſband not having made any proviſion or ſettlement on his wife, was not intitled to the money; and the court declared, that the ſecurity ſhould remain as it was, till ſuch time as the huſband ſhould make a ſuitable proviſion, or till further order from the court. *Nel. Chan. Rep.* 377. The ſame thing ordered, *Skin.* 288. admitted to be the conſtant practice, 2 *Vern.* 494.

3. But if the huſband and wife demand the execution of a truſt of a real eſtate deviſed by will, for the benefit of the wife, it muſt be decreed according to the will, for the wife is *ceſtuy que truſt*, who, when ſhe has execution, may diſpoſe of it as ſhe pleaſes; but in caſe of a perſonal demand, Ld. Chan. ſaid, the court may impoſe terms on the huſband. *Mich.* 1708. *Lupton and Tempeſt*, 2 *Vern.* 626.

4. An infant intitled to the truſt of lands in fee by a collateral anceſtor, marries without her father's conſent, and the father brings a bill againſt the huſband and wife and her truſtees, that a proviſion might be made on her out of thoſe lands; the huſband and wife demur to the bill; and the demurrer was allowed; for it appears by the plaintiff's own ſhewing, that he has no right, either in law or equity, to the lands: But Ld. Chan. ſaid, that if the huſband had been plaintiff, and had been ſeeking any favour from the court, he could then make him do what was reaſonable. *Paſch.* 34 *Car.* 2. *Micoe* and *Powell*, 1 *Vern.* 39.

(H) *Suits and proceedings againſt huſband and wife how to be.*

2 *Freem.* 160, S. C.

1. A Legacy was given to a feme covert; the huſband alone exhibited a bill for it: to which there was a demurrer, becauſe the wife was not made a party; and the demurrer was allowed; for of things merely in action belonging to the wife, as a bond, *&c.* ſhe ought to join in ſuit; *ſecus* of a rent running in the wife's right after marriage; for if the huſband alone ſhould ſue, and it be diſmiſſed, that will not conclude the caſe; and if he die before judgment or decree, the wife cannot revive the ſuit. *Trin.* 14 *Car.* 2. *Clerk* and *Lord Angier*, 1 *Chan. Ca.* 41.

2. A Feme Covert, who has a ſeparate maintenance, may ſue without her huſband; reſolved upon demurrer. 1 *Chan. Ca.* 35.

3.

3. A wife whoſe huſband is baniſhed by Act of Parliament, may act in every thing as a Feme ſole. 2 *Vern.* 104.

4. A bill was exhibited againſt the huſband and wife concerning the wife's inheritance; the huſband ſtood out all the proceſſes of contempt; and it being moved that the bill might be taken *pro confeſſo*, it was oppoſed, becauſe that the wife had in the interim obtained an order to anſwer; in which ſhe ſet forth a title to herſelf; and the Court decreed, that the bill ſhould be taken *pro confeſſo* againſt the huſband only, and that he ſhould account for all the profits of the land received ſince the coverture, and the profits which ſhall be received during the coverture. *Hil.* 1 *Jac.* 2. *Ward* and *Meath*, 2 *Chan. Ca.* 173.

5. A bill was brought by the plaintiff againſt the huſband and wife, daughter of the plaintiff; the huſband put in a plea in the name of him and his wife, and ſwears to the plea, but the wife would not be ſworn; and the huſband moved that the plea might be accepted, ſuggeſting that the wife did it by combination with her mother; and it was ordered that the plea do ſtand for the huſband, and the plaintiff to proceed againſt the wife. 1 *Chan. Ca.* 296.

6. If huſband and wife exhibit a bill for a demand in right of the wife, the defendants anſwer, witneſſes are examined, and publication paſſes, and the huſband dies, and the wife marries a ſecond huſband; if they bring a new bill, they may examine again the ſame witneſſes as were examined in the former cauſe. 2 *Vern.* 197. But *vide* 2 *Vern.* 249. *cont'*, though held that it might be otherwiſe, if the demand had been of the wife's inheritance.

7. If a bill be brought againſt Baron and Feme for a demand out of the ſeparate eſtate of the Feme, and the huſband is beyond ſea, and not amenable by the proceſs of the Court; yet if the wife is ſerved with a *Subpœna*, ſhe muſt appear and anſwer the plaintiff's bill. *Dubois* and *Hole*, 2 *Vern.* 613.

8. Upon the marriage-treaty, the huſband agreed that the wife ſhould have her own fortune to her own uſe, to diſpoſe of it as ſhe thought proper; he afterwards running in debt, was arreſted by his creditors; and the wife in conſideration of their diſcharging the action, gave her note for the payment of the money; the creditors exhibited a bill againſt the huſband and wife, and took out *Subpœna's* againſt both, and actually ſerved the wife, but not the huſband, he being at *Rotterdam*; but neither the huſband nor wife appearing, an attachment was taken out againſt both; and the huſband ſtill keeping out of the way, the wife was taken up, and being moved to be diſcharged, Ld. K. and the Maſter of the Rolls held, that in this caſe the proceſs was regular enough; and that the huſband was joined in the ſuit only for conformity. *Mich.* 1711. *Bell* and *Commiſſary Hyde*. *Prec. in Cha.* 328. and *Gilb. Eq. Rep.* 83, S. C. 3 Wms. Rep. 38. Gilb. Chan. 253. 2 Atk. 50.

9. If the wife's anſwer differs from the huſband's, it ſhall not prejudice the huſband; as if ſhe confeſſes a truſt, which he denies. 1 *Chan. Ca.* For ſhe can be no witneſs againſt her huſband. 2 *Vern.* 79.

(I) *Concerning the Wife's Pin-money and Paraphernalia.*

Prec. in Cha. 26, S. C. 2 P. W. 82. 341. 3 P. W. 355. 1 Atk. 269.

1. IF by a marriage-settlement a term is created for raising 20*l. per Ann.* as pin-money, for the wife's separate use, which is constantly paid her by the husband's steward, except the last year before the husband's death; there being but one year in arrear only, it shall be paid; but it would be otherwise if it had been in arrear several years. *Trin.* 1691. *Offley* and *Offley*.

*2. The plaintiff's relation (to whom he was heir) allowed his wife pin-money, which being in arrear, he gave her a note to this purpose; I am indebted to my wife 100*l.* which became due to her such a day; after, by his will, he makes provision out of his lands for payment of all his debts, and all monies which he owed to any person, in trust for his wife; and the question was, whether the 100*l.* was to be paid within this trust; and Ld. K. decreed not, because in point of law it was no debt, because a man cannot be indebted to his wife; and it was not money due to any in trust for her. *Hil.* 1701. *Cornwall* and *Earl of Mountague*. But *Q.* for the testator looked on this as a debt, and seems to intend to provide for it by his will.

*3. If a woman has pin-money, or a separate maintenance settled on her, and she by management or good house-wifry saves money out of it, she may dispose of such money so saved by her, or of any jewels bought with it, by writing in nature of a will, if she die before her husband, and shall have it herself, if she survive him, and such jewels, &c. shall not be liable to the husband's debts. *Pasc.* 1692. *Herbert* and *Herbert*; and the precedent of *Sir Paul Neal*'s case cited to the same purpose; the wife allowed what she had saved out of her pin-money against the devisee of the real estate. *Mich.* 1694. *Milles* and *Wikes*.

Prec. in Cha. 255. S. C. 2 Eq. Ab. 149. c 2. 1 P. W. 126. 2 P. W. 316. 82. 1 Vef 303, 518. 2 Vef 191. 3 Atk. 695. 709.

4. If a woman, on her marriage, reserves to herself a power of disposing of her personal estate as she thinks proper, all that she dies possessed of is to be taken to be her separate estate, or the produce of it, unless the contrary can be made appear; and as she has a power over the principal, so she may dispose of the produce or interest. *Hil.* 1705. *Gore* and *Knight*, 2 *Vern.* 535. 1 *Vern.* 245, S. P. where it is said, that there had been several decrees ratifying such disposition.

5. If a woman, by her marriage-articles, agrees to have no part of the husband's personal estate but what he should give her by will, this bars her of her paraphernalia. *Per Cur'*, 2 *Vern.* 83.

6. The husband devised the wife's jewels to her for life, the remainder over to his son; one point of the case was, whether they should go to the administrator of the wife, being her paraphernalia; and though it was agreed that where a husband dies intestate, or does not by will dispose of the jewels of his wife, she may claim them, (in case there be no debts;) yet, as he may devise (*a*) them, and as he has in this case given them to her for life only, and she has not made any election or claim to them as her paraphernalia, they cannot go to her administrator. 2 *Vern.* 246, 247.

(*a*) That the husband may devise them, *vide Cro. Car.* 343. but *vide* the case of *Tipping* and *Tipping*, 2 Eq. Ca. Abr. 467. *cont'*. 1 Will. Rep. 729, 730. S. C.

(K) *Con-*

(K) *Concerning Alimony and ſeparate Maintenance.*

1. IF a huſband turns away his wife, or uſes her with cruelty, by which means ſhe is obliged to leave him, Chancery will, upon her own, or *Prochein Amy's* application, decree her a ſeparate maintenance, ſuitable to her degree and quality, the fortune ſhe brought, and her huſband's circumſtances. *Cary* 124. 1 *Chan. Rep.* 4, S. P. 1 *Chan Rep.* 164, S. P.

2. If huſband and wife agree to live ſeparate, and that the wife ſhall have ſo much a year, ſuch agreement will be decreed in equity. *Nel. Chan. Rep.* 73.

3. If there is a decree for a ſeparate maintenance, and the huſband offers to be reconciled, and the wife refuſes, though the Court will ſuſpend the payment of the money, yet will order all the arrears to be brought into Court; and according as there is neceſſity, vacate the decree, or give the wife, upon any ill uſage, liberty to reſort to, and have the benefit of it. 26 *Car.* 2. *Whorewood* and *Whorewood*, 1 *Chan. Ca.* 250.

4. A Feme Covert, who had by her huſband's conſent 50*l. per ann.* ſettled on her, and who had, upon a ſentence in the ſpiritual Court, obtained a decree for 50*l. per ann.* more for alimony, ſuggeſts by her bill, that her huſband had, on purpoſe to defraud her, procured the tenants to ſurrender their eſtates on which the ſaid rents were reſerved, and prayed that it might be made good to her by the decree of this Court; but it appearing that ſhe was a very lewd woman, and had eloped, and her huſband offering in his anſwer to take her again, Ld. Chan. would make no other order in it, but that the huſband ſhould ſtand in the place of the tenants, and admit the rent payable; and ſhe to recover it at law as well as ſhe could. *Paſc.* 1682. *Mildmay* and *Mildmay*, 1 *Vern.* 53.

5. The huſband and wife agree to part, and the wife's father agrees, upon the huſband's giving him a note to pay back the wife's portion, to ſave him harmleſs from any debts his wife may contract, and againſt all demands for her maintenance; the wife with her child, went thereupon and lived with the plaintiff, her father, and were maintained by him; and he now brought his bill to have the portion paid; which was decreed, on his giving ſecurity to indemnify the defendant againſt the debts and maintenance of the wife and child, although the huſband now offered to take his wife home, and maintain her and her child, and to allow the plaintiff for the time paſt. *Mich.* 1700. *Seeling* and *Crawley*, 2 *Vern.* 386.

6. If by marriage-articles 6000*l.* part of the wife's portion, is agreed to be inveſted in Land, and ſettled in truſt for the huſband for life, then to his wife for life, remainder as a proviſion for younger children, remainder to the huſband in fee; and the huſband by his cruelty forces his wife to live ſeparate from him; the Court will decree the intereſt of the 6000*l.* to be paid the wife for her ſeparate maintenance, till cohabitation, there being no iſſue, the money lying dead; and it being a truſt which is properly

Gilb. Eq. Rep. 1. and *Prec. in Chan.* 239. 497. 1 Vern. 53. 2 Vern. 493. 671. 2 Atk. 96.

to be directed by this Court. *Pasc.* 1705. *Oxenden* and *Oxenden*, 2 *Vern.* 493.

7. A wife having been used with cruelty by her husband, becomes intitled to 3000*l.* as her share of her mother's personal estate, who died intestate; and it was decreed that the wife should have the interest of it for her separate use, and then to the husband, if he survived; and afterwards the principal to be paid the issue; and if no issue, then to the survivor of the husband or wife. *Pasc.* 1711. *Nicholls* and *Danvers*, 2 *Vern.* 671. The reporter adds a memorandum, that the husband had given a note to his wife, that if he should again use her ill, she should have her share of her mother's estate to her own use. *Vide* 2 *Vern.* 752. a separate maintenance decreed a wife.

8. A bill was brought to subject the defendant's jointure to the payment of her debts, which she contracted while she had a separate maintenance from her husband. *Per* Ld. Chan. had the separate maintenance continued, there would have been some reason to follow that, and make it liable; but that being at an end, there is no reason that the jointure should be liable; and the bill was dismissed; and the rather, because the executor of the husband, who might have paid the money, was not made a party. *Pasc.* 1685. *Kenge* and *Delaval*, 1 *Vern.* 326.

Vide Gage and *Lister* or *Leicester*, *Eq. Ca. Abr.* Part 2.

9. A woman who has a separate maintenance, may dispose of what she saves out of it by will. *Toth.* 97. 1 *Chan. Ca.* 118, S. P. *Nel. Chan. Rep.* 56, S. P. 1 *Vern.* 245, S. P.

(L) *What Right survives to either of them, or their Representatives, by the Dissolution of the Marriage.*

2 *Freem.* 172, S. C.

1. IF Baron and Feme have a decree for money, in the right of the Feme, and then the Baron dies, the benefit of the decree belongs to the Feme, and not to the executor of the husband: certified by *Hyde* C. J. and his certificate confirmed by Ld. Chan. *Mich.* 15 *Car.* 2. *Nanney* and *Martin*, 1 *Chan. Ca.* 27.

2. If money is left in a trustee's hands, for the benefit of a Feme Covert, and the husband dies, it shall go to the Feme, and not to the executors of the husband, he having made no disposition of it in his life-time. Decreed *Pasc.* 1683. *Twisden* and *Wise*, 1 *Vern.* 161.

2 *Freem.* 102, S. C. *vide* page 70, pl. 14.

3. The husband, in consideration of 500*l.* portion, part in lands and part in bonds, owing to the wife, settles a jointure of 45*l. per ann.* and the husband dying before any fine levied of the lands, or alteration of the bonds, the creditors of the husband sue the widow and the executor of the husband; and it was held though there was not sufficient personal estate besides, that as these securities remained unaltered, and as the law had cast them on the widow, equity could not take them from her; though it was urged that the wife had a jointure settled on her adequate to the portion. *Trin.* 1688. *Lister* and *Lister*, 2 *Vern.* 68.

4. But if upon an intermarriage between *A.* and *B.* who has an estate in land, and a fortune in money, and who are both infants, an

an Act of Parliament is obtained for ſettling a jointure on *B.* the wife, in bar of dower; provided that the jointure ſhall ceaſe, if the wife, when of age, does not ſettle her land, &c. but nothing is ſaid as to the perſonal eſtate, and part of the fortune is a mortgage of 1300*l.* taken in a truſtee's name, though the wife, when ſhe came of age, ſettled her own land only; yet the huſband dying, the mortgage ſhall go to the executors of the huſband, and ſhall not ſurvive to the wife as a choſe in action. Decreed 1705. *Blois* and *Counteſs of Hereford*, 2 *Vern.* 501. And Ld. K. laid it down as a rule, that in all caſes, where a man makes a ſettlement equivalent to the wife's portion, it ſhall be intended that he was to have the portion, though there is no agreement for that purpoſe. Note; *This was a choſe in action in equity, and ſome ſtreſs laid on that, though it does not appear by this report.*

5. If a man marries a woman intitled to a mortgage in fee, and after marriage aſſigns his intereſt in the mortgage to truſtees to call in the money, and lay it out in land to be ſettled on the huſband and wife and their iſſue, remainder to the heirs of the huſband; and the huſband and wife die without iſſue, this mortgage being a choſe in action, ſhall go to the executor of the wife, *Q.* If the wife die firſt. v. ante 68. pl. 2. and not to the executor of the huſband. Decreed *Mich.* 1700. *Burnet* and *Kinnaſton*, 2 *Vern.* 401. 2 *Freem.* 239, S. C. *Pre. in Chan.* 118, 63. 2 Vern 68, 401. Gilb. Rep. 98. 2 P. W. 111. Tab. c. 168 to 170. 1 Atk. 280, 459 2 Atk. 207.

6. *A.* being indebted to a Feme Covert becomes a bankrupt; the huſband pays a contribution, and dies before any diſtribution, and then the wife died; and it was held that the executors of the wife were intitled to the dividend; for the huſband paying contribution, does not alter the property of the bond. 2 *Vern.* 707.

7. But if a ſum of money is awarded the huſband, which he is intitled to in right of his wife, and the huſband dies before it is paid, it will go to his executors, and not ſurvive to the wife, the award being a ſort of judgment which has changed the property. *Paſc.* 1686. *Oglander* and *Baſton*, 1 *Vern.* 396.

8. If a man marries an Orphan of *London*, who dies before twenty-one, yet her ſhare ſhall ſurvive to the huſband, and ſhall not go the other children. 1 *Vern.* 88.

9. If an inheritrix carves out a term for 1000 years to truſtees, and ſhe and her intended huſband declare the truſt to be for the huſband for life, and after his death for the wife and her heirs; and afterwards the huſband and wife by fine *ſur conceſſ.* grant a term of twenty-one years, reſerving the rent to the huſband and wife and the heirs of the wife; yet the adminiſtrator of the wife ſhall not have the benefit of the rent reſerved. 2 *Vern.* 62.

10. If one dies inteſtate, leaving a daughter, the wife of *J. S.* and the daughter dies before any diſtribution made, and the huſband dies inteſtate, the ſhare of the daughter ſhall go to the adminiſtrator of the huſband, and not to her adminiſtrator; but the reporter refers to the decree. *Mich.* 1693. *Cary* and *Taylor*, 2 *Vern.* 302.

11. Baron and Feme jointenants for their lives, Baron ſows the lands, and dies before ſeverance; and the queſtion was, whether the wife, or executors of the huſband, ſhould have the corn; and the court propoſed that each ſhould take a moiety, which was agreed to. *Rowney's* caſe, 2 *Vern.* 322.

12. *A.*

12. *A.* purchaſes a walk in a chaſe, and takes the patent to himſelf and to his wife, and *J. S.* during their lives and the life of the ſurvivor, the huſband dies indebted, yet the wife was decreed the benefit of the patent during her life, for ſhe cannot be a truſtee for her huſband; but after her death *J. S.* is to be a truſtee for the huſband's executor. *Trin.* 1688. *Kingdome* and *Bridges*, 2 *Vern.* 67.

Vide Copping and ——, *Eq. Ca. Abr.* Pt. 2. for S. P.

13. If the huſband lends out money in the names of himſelf and his wife upon mortgages and bonds, and dies, the wife is intitled to the money by ſurvivorſhip, if there are ſufficient aſſets beſides to pay the huſband's debts. *Trin.* 1712. *Chriſt's Hoſpital* and *Budgin*, 2 *Vern.* 683.

Pre. in Chan. 63. 312. 412. 1 Vern. 7. 2 Vern. 68, 501. 1 P. W. 378, 2 P. W. 608. 3 P. W. 199. 2 Veſ. 676.

14. The plaintiff's grandfather was tenant for life of a farm, and the inheritance was in the plantiff's father, to whom he is heir; on the marriage of the plantiff's father with the defendant, who had a portion of 300*l.* in her brother's hands, and ſecured by his bond to her, the father and grandfather join in ſettling this farm upon the defendant for her jointure; and this ſettlement is expreſſed to be made in conſideration of 100*l.* paid to the grandfather for the marriage-portion of the defendant, which 100*l.* was paid to him accordingly by her brother; the marriage took effect, and the defendant's huſband died indebted in ſeveral bonds wherein he and his heirs were bound; and actions were brought againſt the plaintiff, as his heir on the ſaid bonds, to ſubject the real eſtate deſcended to the payment of them; and he brought his bill to have the remaining 200*l.* of the portion applied in diſcharge of theſe debts; which was decreed by the maſter of the rolls; but upon an appeal to Ld. Chan. the decree was reverſed, and held, that it ſurvived to the wife; though he ſaid, that if the ſettlement had been in conſideration of the whole portion, and had been equivalent to it, it muſt have gone to diſcharge the huſband's debts. *Mich.* 1697. *Cleland* and *Cleland.*

Pre. in Chan. 312, S. C. and *Gilb. Eq. Rep.* 170, 240. 2 Vern. 488, 501. Talb. C 168. 3 P. W. 199, (n) 2 Atk. 448.

15. *Richard Middleton*, upon a marriage-treaty with *Barbara Wynn*, agrees, in conſideration of 1250*l.* portion ſecured to her by bond from her brother, to clear his eſtate, being 70*l.* *per annum*, of incumbrances that were then upon it, within ſix months after the marriage ſhould be had; and for every 100*l.* he ſhould receive, to ſettle 10*l.* *per ann.* on her for a jointure, and to ſettle lands on the firſt and other ſons of that marriage; *Barbara* was no party to theſe articles; the marriage takes effect; *Barbara* dies within the ſix months without iſſue; *Richard*, on a ſecond marriage with one *Dorothy* ——, who had a portion of 1600*l.* in truſtees hands, by articles agrees to lay out 1250*l.* he was intitled unto in right of his firſt wife; and this 1600*l.* when received, in the purchaſe of lands, to be ſettled on *Dorothy* for a jointure, and for a proviſion for the iſſue of that marriage; which marriage after takes effect, and then *Richard* dies before he had got in either of the portions; and Ld. K. decreed it to the repreſentatives of *Richard*; and that it ſhould not ſurvive to the adminiſtrator of the firſt wife, he being a purchaſer by his agreement to diſencumber his eſtate; and being in no default, the wife dying within the ſix months, which prevented the making the ſettlement. *Paſc.* 1711. *Medith* and *Wynn.*

CAP.

CAP. XII.

Bill.

(A) *By whom it may be brought.*
(B) *Who are to be Parties to it.*
(C) *Matters proper by a Bill in Equity.*
(D) *Bills of Diſcovery; and herein of what Things there ſhall be a Diſcovery.*
(E) *Bills* quia Timet, *in what Caſes proper.*
(F) *Bills of Peace to prevent Multiplicity of Suits.*
(G) *Croſs Bills.*
(H) *Supplemental Bill.*
(I) *Bills of Interpleader.*
(K) Certiorari *Bills.*
(L) *Bills of Review and Reverſal.*
(M) *Bills original after a Decree.*
(N) *Bill taken* pro confeſſo.

(A) *By whom it may be brought.*

1. THE King may ſue in Chancery for equity. 1 *Rol. Abr.* 373.

2. The Chancellor himſelf may ſue or be ſued in equity, but he cannot make a decree in his own cauſe. *ibid.*

3. If an alien purchaſes lands in the name of another, admitting the King is intitled to the truſt; yet he muſt ſue in equity to have it executed. 1 *Rol. Abr.* 194.

4. The church-wardens may join with a poor perſon who is chargeable to the pariſh. *March* 90.

5. A bill may be brought in behalf of an infant *in ventre ſa mere*, and an injunction obtained to ſtay waſte. 2 *Vern.* 711.

6. Any

Prec. in Cha. 376. & *Gilb. Rep.* 36, S.C. 1 Atk. 570.

6. Any one may bring a bill as *prochein amy* to an infant, without his conſent, becauſe it is at his peril that he brings it, to be anſwerable for the event; but none can bring a bill in the name of a feme covert, as her *prochein amy*, without her conſent; and if ſuch bill be brought, upon her affidavit of the matter it will be diſmiſſed; agreed by the Court. *Mich.* 1713. *Andrews* and *Cradock.*

(B) *Who are to be Parties to it.*

1. IF a man grants a rent-charge, and afterwards ſells the lands by parcels, and the grantee ſues for the rent, he muſt make all the purchaſers (*a*) parties. *Cary* 3, 33, S. P.

(*a*) If two or more have a joint intereſt, regularly they muſt be all parties to the bill; ſo if two or more are liable to a demand, you cannot proceed againſt one alone. 2 *Vern.* 195. So all executors, truſtees, or their repreſentatives, are to be made parties; but this rule may be diſpenſed with, if any of them are not amenable, or if they have ſtood out proceſs to a ſequeſtration.

Vide Attorney General & Wyburgh & al'. Abr. Eq. Part 2. S. P.

2. But in caſe of a charity, *it is not neceſſary that all the tertenants ſhould be made parties*, for the charity ſhall not be put to that difficulty; but the tertenants may, if they ſeek a contribution, undertake to make them parties to the information, or help themſelves by ſuch courſe as they ſhall think fit. 1 *Salk.* 163.

3. If there be an agreement in a pariſh, by a veſtry order, that 100*l. per ann.* ſhould be paid to *A.* for a lecture in the pariſh, in a bill for the recovery thereof, all the parties to the order muſt be made defendants; otherwiſe it cannot be decreed. *Mich.* 15 *Car.* 2. *Henchman* and *Ayer*, *Hard.* 333.

4. The bill being to have an account of a truſt, the defendant pleaded, that he was intruſted for 3 children, *viz.* for the plaintiff and his two brothers; and that the other two not being made parties to the ſuit, he was not bound to anſwer; for otherwiſe he might be thrice called to an account for the ſame matter; and the plea was allowed. *Mich.* 1682. *Hanne* and *Stevens*, 1 *Vern.* 110.

5. But if *A.* deviſes ſeveral legacies to *B. C.* and *D.* and that if his eſtate fell ſhort, each to abate in proportion; but if it increaſed, that each legacy ſhould increaſe in proportion; in this caſe one alone may ſue for his legacy; and it is not neceſſary that the other legatees ſhould be made parties. *Mich.* 34 *Car.* 2. *Haycock* and *Haycock*, 2 *Chan. Ca.* 124. Though one legatee may ſue, yet if the reſidue of the perſonal eſtate be deviſed to three, *Q.* whether one of them may alone ſue for his part; and *vide Nel. Chan. Rep.* 243. where it is held that he cannot.

6. If a bill be exhibited againſt the ſheriff and plaintiff at law, to be relieved againſt a bail-bond aſſigned by fraud by the ſheriff; let the proof of the fraud be never ſo ſtrong, yet if the plaintiff at law is not ſerved with an order to anſwer, ſo as to be made a party, the plaintiff can have no relief: Ordered by the Maſter of the rolls. *Mich.* 1682. *Izraell* and *Narbourne*, 1 *Vern.* 87.

7. A bill being exhibited for diſcovery of a bankrupt's eſtate, the defendant demurred thereto, becauſe the bankrupt was not made a party; and the demurrer was allowed. *Hil.* 1688. *Sharp* and *Gamon*, 2 *Vern.* 32.

8. Upon

8. Upon a bill for a ſpecific performance of a covenant under hand and ſeal with *A.* for the benefit of *B.* *A.* muſt be made a Party to the ſuit; but if it had been only a promiſe, either *A.* or *B.* might have brought the action, according to the caſe in * *Yelverton's Reports*, *Hil.* 1638. *Cook* and *Cook*, 2 *Vern.* 36. *Rolls* ver. *Yeates*, 177.

9. If a perſon claims any thing due from the teſtator, the executor muſt be made a party. *Rep. in Chan. Temp. Finch* 334. all executors muſt ſue and be ſued. 3 *Chan. Rep.* 92.

10. If a legatee of a term ſues for it, he muſt make the executor a party, although he alledges he has his aſſent. *Moor* and *Blagrave*, 1 *Chan. Ca.* 277.

11. So if an executor does actually releaſe, yet he muſt be made a party to the ſuit. *Hil.* 1681. *Smithby* and *Hinton*, 1 *Vern.* 31.

12. But if the plaintiff ſues one executor, and alledges in his bill that he does not know who the executor is, and prays a diſcovery, this will be no cauſe of demurrer; ruled *Mich.* 1682. *Bowyer* and *Covert*, 1 *Vern.* 95.

13. In a bill to be relieved touching a leaſe for years, or other perſonal duty againſt executors, though the executors be but executors in truſt; yet it is not neceſſary to make the *ceſtuy que truſts*, or reſiduary legatees, parties. 1 *Vern.* 261.

14. In a bill to be relieved againſt an award made by ſome of the members of the *Eaſt-India* company, touching the *quantum* of freight due to the plaintiff from the company; the arbitrators, and ſome of the particular members being made defendants, they demurred to the whole bill, becauſe the plaintiff could have no decree againſt them; and their anſwers would be no evidence againſt the company; and the plaintiff might examine them as witneſſes. And the demurrer was allowed without putting them to anſwer as to matters of fraud and contrivance. *Trin.* 1700. *Dr. Stewart* and *the Eaſt-India company*, 2 *Vern.* 380.

15. If any one ſue in Chancery an executor of an obligor to diſcover aſſets, all the obligors muſt be made parties, that the charge may lie equal. 2 *Vent.* 348. The reporter adds a *quere*, whether the principal may not be ſued without thoſe who are bound as ſureties. *vide Nel. Chan. Rep.* 105. where it is held not to be neceſſary to ſue all the obligors; and that any one who is compelled to pay the money, may compel the others to contribute.

16. But it is clear, that if a judgment be had at law againſt one obligor, you may ſue the executor of him alone to diſcover aſſets, &c. becauſe the bond is drowned in the judgment. 2 *Vent.* 348. 2 *Chan. Ca.* 29, S. P.

17. If one of the defendants is proſecuted to a ſequeſtration, the cauſe may be carried on without him. *Mich.* 1699. *Parker* and *Blackburne*. *Prec. in Cha.* 99 2 Vern. 369. S. C. another P.

* 18. The plaintiff being reſiduary legatee, brought his bill againſt the defendant, who was one of the executors (without his co-executor, who was beyond ſea) to have an account of his own receipts and payments: the defendant inſiſted, that his co-executor ought to be made a party; but Ld. Chan. ordered the cauſe to go on and ſaid, that if any thing appeared difficult on the account, the court would take care of it. And as a bill may be brought againſt one factor without his co-factor, being beyond ſea, that the ſame reaſon held here. *Mich.* 1698. *Cowſlad* and *Cely*.

* 19. *Bar-*

* 19. *Barnard Spark*, in 1661. made his will, and amongſt other legacies deviſed an annuity of 20*l. per ann.* to *B.* to be paid quarterly, and gives other legacies; and then has this clauſe, *all the reſt of my real and perſonal Eſtate not before bequeathed (my debts being paid) I give to my brother* John Spark, and makes him ſole executor; and he paid the annuity ſeveral years, and made his will, and charged all his real and perſonal eſtate with this annuity, and deviſed all his real and perſonal eſtate in *England* (part of which was the eſtate of *Barnard*) to his two daughters, who were defendants; and all his real and perſonal eſtate in *Barbadoes* to his two other daughters that lived in *Barbadoes*, and were no parties to this ſuit; the two daughters here paid the annuity ſeveral years, but then ſtopt payment, on pretence that the words of *Barnard*'s will did not charge his real eſtate with this annuity; or if they did, yet the perſonal eſtate ought to be firſt exhauſted, which did not appear to be: and the real and perſonal eſtate in *Barbadoes* being equally liable by the will of John, the daughters, who have thoſe, ought to be made parties, for they might have made ſatisfaction; or however, they ought to have been before the court, that the defendants might at the ſame time have a decree againſt them to pay their proportion; for though at law the party may take its remedy againſt which he pleaſes, yet in equity all muſt be parties, that right may be done to all at the ſame time. On the other ſide it was ſaid, admit it to be ſo, in caſe it may be eaſily done, yet it is impracticable in this caſe, and therefore ought not to be required; and ſo held Ld. K. and that the lands were charged by *Barnard*'s will; and if any ſatisfaction has been made by thoſe in *Barbadoes*, it lay on the defendant's part to ſhew it. *Paſch.* 1702, *Quintine* and *Yard.*

20. * Sir *Edmund Forteſcue*, in the Year 1664. ſettled his eſtate upon *Powel*, *Glendale*, and *Harris*, in truſt to pay his debts in the firſt place, then to pay ſuch portions as he ſhould give to his children, and laſtly his legacies; and the overplus to be laid out in a purchaſe in truſt for the firſt ſon, and the heirs of his body, and ſo for the ſecond, *&c.* and for want of ſuch iſſue, in truſt for himſelf and his heirs; the plaintiff, his granddaughter and heir at law on whom the truſt devolved, brought her bill againſt the adminiſtrator and heir at law of *Harris*, (*Powel*, *Glendale*, and *Harris* being dead) to diſcover ſome lands purchaſed with the overplus money by *Harris*, who had formerly been a ſervant in Sir *Edmund*'s family, and who alone had tranſacted the truſt, to which it was objected, that the repreſentatives of the other truſtees ought to have been before the court; but the plaintiff inſiſting only to have an account of what came to the proper hands of *Harris*, and of his receipts and diſburſements only, and not of any joint-receipts or tranſactions by him, with the other truſtees; the objection was over-ruled. *Hil.* 9. *Ann. Lady Selyard* and *the executors of Harris & al'.*

(C) *Matters*

(C) *Matters proper for a Bill in Equity.*

Vide Title *Courts and their Juriſdiction*, Letter (B).

1. A Bill in equity lies to ſet aſide letters patent obtained by Fraud. *Attorney General* verſus *Vernon*, 1 *Vern.* 277.

2. A ſolicitor may have a bill for fees only, if for buſineſs done in this court; and ſo he may when the buſineſs is done in another court, if it relates to another demand the plaintiff makes in this court. *Comes Raneleigh* and *Thornhill*, 17 *Nov.* 1683. 1 *Vern.* 203.

3. A bill in equity will lie for recovering antient quit-rents, though very ſmall, as two or three ſhillings *per Annum*. *Cox* and *Foley*, 1 *Vern.* 359.

4. (*a*) A ſuit for ſmall tithes, not proper for chancery; neither has it been uſed; *per* Sir *John Churchil*, as *Amicus Curie*. 2 *Chan. Ca.* 237.

(*a*) The court of Chancery will not retain a ſuit by *Engliſh* Bill under 10*l* value, except in Caſes of Charity, nor under the Value of 40*s*. *per Annum* in Lands.

5. The plaintiff being executor, and his teſtator greatly indebted, and being deſirous to be rid of the aſſets as far as they would go, and that his payments might not be afterwards queſtioned, brought a bill againſt all the creditors, to the intent they might, if they would, conteſt each others debts, and diſpute who ought to be preferred in payment; the defendant being a creditor demurred, for that the bill contained multiplicity of matter wherein he was not concerned. But the court over-ruled the demurrer, and held it a proper bill, and a ſafe way for an executor to take. *Hil.* 1688. *Buckle* and *Atleo*, 2 *Vern.* 37.

6. If *A.* obtains a decree before the Ordinary for an iſle in a Church, and he brings bill for the decree of this Court to quiet him in poſſeſſion, the bill will be diſmiſſed with coſts; for this Court executes not its own decrees by bill without examining the juſtice of them. *Puſch.* 1691. *Baker* and *Child*, 2 *Vern.* 226.

(D) *Bills of Diſcovery; and herein of what Things there ſhall be a Diſcovery.*

1. IF the King grants the goods of a felon, the grantee may compel any one, in whoſe poſſeſſion they are, to diſcover them. *Cary* 1.

2. If a perſon is outlawed, a bill may be exhibited by the Attorney General to diſcover his real and perſonal eſtate; for the outlawry is in nature of a gift to, or judgment for the King. *Mich.* 1655. *The Protector* and *Lord Lumley*, *Hard.* 22.

3. A bill was exhibited by the Attorney General in the Exchequer, wherein it was charged that the defendant, being a merchant, had concealed the cuſtom of 290 caſks of currants; and for the better effecting thereof, had given 40*l.* a-piece to two Cuſtom-houſe Officers; and relief and diſcovery prayed; but upon a demurrer it was doubted, whether the defendant ſhould be bound to diſcover. *Hard.* 137. *Hard.* 201, S. P. adjourned, where it was alledged, the Attorney General would not proſecute for the forfeiture, but for the duty only.

4. If

4. If the plaintiff alledges, that the defendant had cauſed the plaintiff's *Port* wines to be ſeized as *French* wines, on purpoſe to raiſe the price of the market, and to ſell his own wines at a better rate, and detained the plaintiff's till he had ſold his own wines, and then relinquiſhed his proſecution, well knowing that the plaintiff's wines were *Port* wines: and he prays an anſwer and diſcovery to thoſe matters, in order to his bringing an action. The defendant may plead the act for prohibiting of *French* wines, and a penal clauſe therein on any man that ſhould ſeize wines, and afterwards relinquiſh his proſecution; and it will be allowed. *Mich.* 1682. *Bird* and *Hardwick*, 1 *Vern.* 109. *nemotenetur ſeipſum accuſare max.*

5. If it is charged by the bill, that the defendant in 1659. by colour of an order of ſequeſtration by the committee, had ſeized ſeveral tithes, *&c.* due to the plaintiff, the plaintiff may pray a diſcovery of the particulars ſo taken, and their value; as where a man by colour of a title enters into a houſe, *&c.* and poſſeſſes himſelf of the goods, *&c.* for it may be impoſſible for the plaintiff to diſcover the particulars without ſuch bill; and this is a charge, not by way of treſpaſs, but under colour of title. So where a will is proved, and the precedent adminiſtration revoked, ſuch bill is uſually neceſſary for the diſcovery of the goods; and yet in ſtrictneſs of law there was a treſpaſs; reſolved upon a demurrer. *Cage* and *Warner*, *Hard.* 1682.

6. A bill was brought to diſcover who was owner of a wharf and lighter, to enable the plaintiff to bring an action for the damages his goods ſuſtained by the lighter's being overſet by negligence of the lighterman; to which the defendant demurred; but the demurrer was over-ruled. *Sir John Heathcoat* and *Sir John Fleet*, 2 *Vern.* 442.

7. So where the ſhip called the *Turkey-Merchant*, taken fire by the neglect of the maſter or ſhip's crew; the plaintiff, who was one of the Freighters, and had his goods burnt, brought his bill to diſcover who were part-owners of the ſhip, to enable him to bring his action; to which the defendant demurred, and inſiſted that this was like the caſe where a fire happens in a man's houſe, and burns his neighbour's alſo; although he is liable to damages at law, yet the plaintiff, in ſuch caſe, ſhall not be aſſiſted in equity; but the court held that the caſe put was not parallel; for though the law gives an action, yet it doth not ariſe out of any contract or undertakeing of the party; and that this and the precedent caſe came within the reaſon of the caſe of any common carrier; and therefore over-ruled the demurrer. *Mich.* 1703. *Morſe* and *Buckworth*, 2 *Vern.* 443.

8. A bill was brought to diſcover who was tenant of the freehold, in order to bring a *Formedon*; to which there was a demurrer, and it was allowed. *Hil.* 1683. *Stapleton* and *Sherrard*, 1 *Vern.* 212. Though the caſe of *Bickerton* and *Bickerton* was quoted to the contrary. *Vide Cary* 22. where it is ſaid that ſuch bills have been frequent.

9. A demurrer to a bill brought to diſcover the tenant to a *Præcipe* on a voluntary conveyance, allowed. *Mich.* 1684. *Sherburn* and *Clerk*, 1 *Vern.* 273. 1 *Vern.* 213, S. P. *Per* Ld. K. who ſaid that there were ways of knowing it without.

10. If

10. If a bill be exhibited to diſcover whether a woman be married or no, and marriage would be a forfeiture of her eſtate, ſhe is not obliged to diſcover; ſuch a bill diſmiſſed. 24 *Car.* 2 *Monnins* and *Monnins*, 2 *Chan. Rep.* 86.

11. If a bill be brought to eſtabliſh an agreement for a ſeparate maintenance, and the wife ſeeks a diſcovery of hard uſage, the huſband may demur to that part, and it will be allowed. *Mich.* 1682. *Hinks* and *Nelthorp*, 1 *Vern.* 204.

12. The plaintiffs bill was for a diſcovery of a perſonal eſtate that was deviſed to charities relating to the college of, *&c.* the defendant pleaded, that the will was not yet proved, but was controverted in the Spiritual Court; but the Court over-ruled the plea, a diſcovery of the eſtate being for the benefit of all perſons intereſted therein, and neceſſary for the preſervation thereof. *Paſch.* 1688. *Dulwich College* and *Johnſon*, 2 *Vern.* 49. 1 *Vern.* 106, S. P. *accord*, where the right of adminiſtration was conteſted.

13. The plaintiff having obtained a judgment againſt the defendant on a bond of 1400*l.* penalty for payment of 700*l.* and intereſt, brought his bill ſetting forth his judgment, and complained that the defendant, to defraud him of the benefit of it, had aſſigned his eſtate to truſtees, that he had lent 1200*l.* to *R.* and *G.* who were ſince become bankrupts in the name of one *E.* but that it was in truſt for the defendant; and therefore prayed a diſcovery of the matter: and that the plaintiff might come in under the ſtatute of bankruptcy for this 1200*l.* debt; and that the commiſſioners might not make any diſtribution till this matter was determined. The defendant demurred, for that there could not be a diſcovery of a man's perſonal eſtate in his life-time; and for that this bill was in nature of a foreign attachment, which the practice of this court did not admit or countenance; but the demurrer was over-ruled. *Paſch.* 1686. *Smitheir* and *Lewis*, 1 *Vern.* 398. 399.

14. But where *A.* obtained judgemnt againſt *B.* and brought a bill againſt *C.* for a diſcovery of *B*'s goods, which *C.* had got into his hands; and the defendant demurred, becauſe the plaintiff had not alledged he had taken out execution againſt *B.* and the demurrer was allowed. *Paſch.* 1686. *Angell* and *Draper*, 1 *Vern.* 399.

* 15. The bill was to diſcover whether the defendant had not aſſigned over a leaſe; the defendant pleads that there was a proviſo in the leaſe, that in caſe he aſſigned over, the leaſe ſhould be void; and that this being in the nature of a penalty or forfeiture, he ought not to be compelled in a court of equity to diſcover. For the plaintiff it was ſaid, that this was not a penalty, but part of the contract; yet the plea was allowed. *Hil.* 1700. *Fane* and *Atlee*.

* 16. The defendant was one of the ſupercargoes of the *Royal George*, belonging to the plaintiffs; and on his being ſo appointed, entered into a bond with ſureties, of 5000*l.* penalty, not to trade to any of the places prohibited by the act of the 9th of the late Queen for erecting the *South-Sea* company, or contrary to the *Aſſiento* contract with the King of *Spain*, and ſeveral other reſtrictions; and he on his part covenanted not to trade to any of the ſaid places, or contrary to the ſaid contract; and covenanted not to plead or demur to any bill which ſhould be brought againſt him in equity for diſcovering of his trading or dealings contrary to his agreement;

agreement; and this bill was brought, charging him with ſeveral breaches of covenant, to the prejudice of the plaintiffs, to the amount of ſeveral thouſand pounds, and for a diſcovery thereof, &c. and the plaintiffs by their bill waved the 5000*l.* penalty of the bond. To this bill the defendant pleaded the ſtatute 9 *Annæ*, and ſeveral articles of the *Aſſiento* contract, whereby whoever traded contrary thereunto, were liable to great penalties, as confiſcation of ſhip and goods, and ſeveral other forfeitures. And it was ſtrongly urged, that by law no one was bound to diſcover any matters which tended to ſubject him to penalties or forfeitures; that it was the buſineſs of courts of equity to relieve againſt, not to aſſiſt forfeitures; and that this covenant not to plead or demur was illegal and void in itſelf, as it tended to deprive him of the benefit of the law, like a covenant not to bring a replevin, or ſuch like. But the plea was over-ruled; becauſe he certainly might, if he thought fit, forego or wave the benefit of the law in thoſe particulars, which here he has expreſly covenanted to do; and which were the more neceſſary to be required of him, as the plaintiffs themſelves were under like penalties, in caſe any of their factors or agents traded contrary to that act, or the *Aſſiento* contract: and this covenant not to plead or demur, was purpoſely to obviate the pretence, that he ought not to diſcover any thing whereby to ſubject himſelf to any penalties; which, ſince he has expreſly conſented to and covenanted for, he ſhall not now be at liberty to object to the illegality of: and it was ſaid to be ſo reſolved in a like caſe between the *E. I. company* and *Atkins*, in the time of Lord *Macclesfield*, on a very ſolemn debate. *Mich.* 1728. *South-Sea company* verſus *Bumſted.*

(E) *Bills* quia Timet *in what Caſes proper.*

1. *A.* Had the uſe of goods and a library for life, remainder to the plaintiff's wife, who was dead; but he as her adminiſtrator, brought his bill to have the goods, &c. ſecured to him after the death of *A.* which was decreed accordingly. 12 *Car.* 1. *Bracken* and *Bently*, 1 *Chan. Rep.* 110.

2. A bill was brought to deliver up an apprentice's bond and indentures, he being out of his time; and it was ordered that the maſter do either bring his action within a year, or deliver up the bond and indentures; for if it were at the maſter's choice to ſtay as long as he pleaſed, he would perhaps ſtay till the apprentice's witneſſes were dead. 17 *Car.* 2. *Baker* and *Shelbury*, 1 *Chan. Ca.* 70.

3. The defendant's teſtator gave the plaintiff 1000*l.* to be paid at the age of twenty-one years: the bill ſuggeſted that the defendant, who was executor, waſted the eſtate; and therefore the plaintiff prayed that he might give ſecurity for the payment of the legacy at ſuch time as it ſhould become due, which the maſter of the rolls decreed accordingly. *Hil.* 2 *Car.* 2. *Duncumbun* and *Stint*, 1 *Chan. Ca.* 121.

2 *Freem.* 138, *S. C.* 24 *Feb.* 1673.

4. If *A.* being ſeiſed of lands in fee, grants a rent-charge iſſuing thereout, and after deviſes the lands to *B.* for life, the remainder to *C.* in fee, and dies, *C.* may compel *B.* to pay the arrears,

rears, for fear all ſhould fall on *C.* in reverſion; although it was urged, that this was a remote poſſibility. *Hil.* 25 *Car.* 2. *Hayes* and *Hayes*, 1 *Chan. Ca.* 223.

5. If *A.* is bound for *B.* and has a counter-bond from *B.* and the money is become payable on the original bond, equity will compel *B.* to pay the debt, though *A.* is not ſued; for it is unreaſonable that a man ſhould always have ſuch a cloud hang over him. *Per North* Ld K. 1 *Vern.* 190.

(F) *Bills of Peace to prevent Multiplicity of Suits.*

1. UPON a motion for a new trial after verdicts upon two iſſues, which were directed, the one to try whether the lord of a manor had a grant of free warren; and the other, in caſe he had the grant of free warren, whether there was ſufficient common left for the tenants; Ld. Chan. ſaid, That thoſe matters were properly triable at law; but it being urged, that the bill was brought to prevent multiplicity of ſuits, and was in nature of a bill of peace, a new trial was granted upon payment of full coſts. *Mich.* 1681. *How* and *the Tenants of Bromſgrove*, 1 *Vern.* 22. *Cary* 3. Bills of peace proper in equity. 1 *Vern.* 266, where ſeveral tenants of a manor claimed a right to the profits of a fair; and a bill was allowed to eſtabliſh it.

2. A bill ſhewing that one commoner had recovered one ſhilling, or other ſmall damages, againſt the plaintiff for oppreſſing the common, or for uſing the common where he ought not; and therefore that the defendant, another commoner, may accept of like damages for what is paſt, to prevent charges at law, is in nature of a bill of peace, and proper in equity. 1 *Vern.* 308.

3. *A.* directed *B.* to pay to *C.* what ſums *C.* ſhould want, *C.* accordingly received two ſums of money (amongſt others) of *B.* for which he gave receipts, as by the order of *A.* *A.* and *C.* come to an account, which being ſtated, they gave mutual releaſes; but the two ſums not being entered in the books of *A.* were not accounted for by *C.* *B.* not having received any allowance from *A.* for the two ſums, prefers his bill againſt *C.* to have the money paid back. *C.* confeſſed the receipts, but inſiſted that he ought not to pay the money, for that they never had any dealings together, but upon the credit of *A.* and it was to be preſumed that the plaintiff had an allowance from *A.* he never paying the defendant any thing, but upon the credit of *A.* and the receipts ſo worded. But the Court decreed that the defendant ſhould return the money; for the plaintiff has a fair claim againſt the defendant to avoid circuity of ſuits; for otherwiſe it would only turn the plaintiff on *A.* and *A.* on the defendant again in equity, to ſet aſide the releaſe, and to have an allowance of theſe ſums. *Show.* P. C. 17.

(G) *Croſs*

(G) *Croſs Bills.*

1. A Croſs-bill is a bill brought by the defendant againſt the plaintiff in a prior ſuit depending; it muſt be brought before publication paſt in the other ſuit, except the plaintiff in the croſs-bill will go to hearing upon the depoſitions already publiſhed, becauſe of the danger of perjury and ſubornation. *Vide Rep. Tem. Finch* 103.

2. If there be a bill exhibited in one Court of equity, there may be a croſs-bill in another; as if the mortgagor exhibits a bill to redeem in the Exchequer, the defendant may bring a bill in Chancery to foreclose; *Per North* Ld. K. 1 *Vern.* 221.

(H) *Supplemental Bills.*

1. THE plaintiff brought a ſupplemental bill for diſcovery of more evidence touching a matter of account, to which the defendant pleaded the former bill, and that the cauſe was heard, and an account directed; but he was ordered to anſwer to all matters in this bill not anſwered unto in the former caſe, but the plaintiff not to reply or proceed any farther without order. 30 *Car.* 2. *Boeve* and *Skipwith*, 2 *Chan. Rep.* 142.

2. In a bill of review a new ſupplemental bill may be added, *Hil.* 1682. *Price* and *Keyte*, 1 *Vern.* 135.

(I) *Bills of Interpleader.*

1. IF a cauſe has been heard upon a bill of (*a*) interpleader, and a trial at law directed to ſettle the right between the defendants, there is an end of the ſuit, as to the plaintiff; ſo that if he afterwards dies, the cauſe ſhall ſtill proceed, and there needs no revivor, each defendant being in the nature of a plaintiff: Ruled upon motion. 1 *Vern.* 351.

(*a*) A bill of interpleader is a bill exhibited by a third perſon, who not knowing to whom he ought of right to render a debt or duty, fears he may be hurt by ſome of the claimants, and therefore prays that they may interplead, ſo that the Court may judge to whom the thing belongs; and he thereby rendered ſafe on the payment: and this he may do, whether any ſuits be actually commenced againſt him in law or equity, or is only in danger of being moleſted by the printed orders; it appears that the plaintiff in a bill of interpleader muſt annex to his bill, or upon filing thereof make an affidavit, that there is no colluſion between him and any of the parties.

(K) Certiorari *Bills.*

1. THE plaintiff brought a (*a*) *certiorari* bill to remove a cauſe out of the mayor's court, his witneſſes living out of that juriſdiction, and inſerted other matters relating to an account not in controverſy in the mayor's court. After examination of witneſſes,

(*a*) A *certiorari* bill is for removing a cauſe out of an inferior court of equity, upon ſuggeſtion that the cauſe is out of its juriſdiction, or that the witneſſes live out of the juriſdiction, or upon ſome good reaſons given, why equal juſtice may not be had in ſuch court; but whether, after a decree in any ſuch court, a bill of appeal or review will lie to chancery to reverſe it, *quære*, & *vide* 1 *Vern.* 177, 184, 443.

neſſes, the defendant moved for a *procedendo*, and inſiſted, that if the cauſe ſhould be heard here, he could not be relieved, not having any bill here; but a *procedendo* was denied, the bill containing other matters not determinable in the mayor's court; neither can the bill be divided: But the cauſe after hearing was diſmiſſed out of this court. *Mich.* 15 *Car.* 2. *Rich* and *Jaquis*, 1 *Chan. Ca.* 31. 2 *Freem.* 174, S. C.

2. The plaintiff, an apprentice, had ſued in the mayor's court to have 150*l.* repaid, which his mother had given to the defendant to take him as his apprentice; the defendant brought his *certiorari* bill, and entered into bond to prove his ſuggeſtions within the time limited, as uſual; and upon a reference to a maſter, he certified the plaintiff had proved his ſuggeſtions; and thereupon, although a *procedendo* was ſeveral times moved for, it was denied; ſo the defendant was neceſſitated to reply, and both ſides examined their witneſſes; and publication being paſſed, the plaintiff ſerved the defendant to hear judgment; and upon opening the nature of the caſe, Ld. K. and Maſter of the Rolls were both of opinion, that it ſhould be ſent back to be determined in the mayor's court; and the regiſter ſaid it had been often done both ways, ſometimes retained and decreed here, but oftener ſent back; ſometimes after publication, and ſometimes after a *ſubpœna* ſerved to hear judgment. *Hil.* 1704. *Stephenſon* and *Houlditch*, 2 *Vern.* 491.

(L) *Bills of Review and Reverſal.*

1. IF the Chancellor errs in a decree in a matter of law, and it appears within the decree, this decree may be reviewed for this error. 1 *Rol. Abr.* 332.

2. So if the Chancellor errs in his conſcience upon a matter of fact proved before him, there may be a review upon this matter, becauſe there needs no examination; but this may be reviewed on the old depoſitions; and this is uſual. *ibid* 382.

3. But if the Chancellor errs in his decree upon a matter of fact, this decree is final, and cannot be reviewed, becauſe they cannot go upon a new examination of witneſſes now; for after publication this cannot be done. *ibid.*

4. No new evidence, or matter which might have been uſed in the firſt cauſe, and of which the party had then knowledge, ſhall be ſufficient grounds for a bill of review. 3 *Chan. Rep.* 76. 1 *chan. ca.* 43, S. P. Laid down by counſel as a maxim. 2 *chan. rep.* 45, S. P.

5. No errors can be aſſigned on a bill of review, but errors in law; and ſuch muſt appear from the facts ſtated in the decree; if new matter is after diſcovered, it can only be aſſigned for error, by leave of the court. *Paſc.* 1683. *Milliſh* and *Williams*, 1 *Vern.* 166. 1 *Vern.* 292, S. P. *per cur'*.

6. If a man brings a bill of review, to which there is a demurrer, and the demurrer allowed, he cannot afterwards bring a new bill of review. 1 *Vern.* 44. 1 *Vern.* 417, S. P.

7. So where a bill was taken *pro confeſſo*, and a bill of review brought, to which the defendant demurred, which was allowed;

and a new bill of review being brought, the defendant demurred; and for cauſe ſhewed, that a bill of review lies not after a bill of review; and the demurrer was allowed. *Hil.* 1682. *Dunny* and *Filmore*, 1 *Vern.* 135. 2 *chan. ca.* 133, S. C.

8. Where a demurrer to a bill of review is allowed, it may be inrolled; but if over-ruled, that cannot be inrolled, ſo as to prevent the demurrer's being re-argued. *Hil.* 1690. *Woots* and *Tucker*, 2 *Vern.* 120. *per cur'.*

9. A decree was obtained for a large ſum of money, and a bill of review was brought, and new matter aſſigned for error; and the rule of court was pleaded, *viz.* that the defendant ought firſt to pay the money into court before the bill brought: but *per cur'.* let him give good ſecurity, and we will diſpenſe with the rule. 14 *Car.* 2. *Levil* and *Darrey*, 1 *chan. ca.* 42.

10. On a motion to ſtay proceedings on a decree until the plaintiff was heard on a bill of review, it being inſiſted upon that a bill of review was in itſelf a *ſuperſedeas*, and like a writ of error at law; but *per* Ld. K. the decree ſhall be performed to a tittle before any bill of review be allowed, unleſs the plaintiff will ſwear that he is not able to perform the decree, and will ſurrender himſelf to the *fleet*, and lie in priſon till the matter be determined on the bill of review. *Hil.* 1682. *Williams* and *Melliſh*, 1 *Vern.* 117.

11. Upon a motion that a bill of review might be admitted, without payment of the coſts of the former ſuit, amounting to 150*l.* for which the now plaintiff, as was pretended, had been in execution almoſt twenty years, and was not able to pay them. *Per cur'*, Upon his making oath that he is not worth 40*l.* beſides the matter in queſtion, and beſides a ſuit depending between the ſame parties to foreclоſe a mortgage, the debt being pretended to be overpaid, he ſhall be admitted to bring his bill of review without payment of coſts. *Mich.* 1684. *Fitton* and *Macclesfield*, 1 *Vern.* 264. *vide* 1 *Vern.* 292. where it is ſaid, that paying of coſts, upon bringing a bill of review, is diſpenſed with by a late order. 1 *Vern.* 292.

(M) *Bills original after a Decree.*

1. A Feme Covert, after ſeparation from her huſband, had a decree for alimony, which decree was confirmed on a bill of review; but the huſband being willing to be reconciled to his wife, and to cohabit with her, exhibited an original bill to ſet aſide the decree; and it was held by *Finch* Ld. K. aſſiſted by *North* C. J. to be a proper bill. *Hil.* 26 *Car. Whorewood* and *Whorewood*, 1 *chan. ca.* 250. where it is ſaid to have been reſolved, that where a decree is temporary, or for ſpecial ends, an original bill lies, to ſhew that the purpoſes of the decree are ſatisfied, and to put a period to it. *Vide* 2 *chan. rep.* 128.

2. An original bill to execute a decree of lands againſt a purchaſer, who claimed under parties bound by that decree, was allowed good on demurrer thereto, by Ld. K. *Trin.* 26 *Car.* 2. *Organ* and *Gardiner*, 1 *chan. ca.* 231.

3. If

3. If a bill be brought to have the benefit of a former decree, e plaintiff cannot examine witneſſes, much leſs the ſame wit-ſſes to the matters in iſſue in the former cauſe; but on ſuch a ll the court may examine the juſtice of the former decree; but en it muſt be by proofs taken in the cauſe wherein that decree made. *Per cur'*, 2 *Vern.* 409. *vide* 1 *chan. ca.* 45. where it is id, that no original bill ought to be brought to explain a decree any matter precedent to the decree.

*4. An original bill, barely in nature of a bill of revivor, and ot broader or longer than a bill of revivor only, does not open the ſt decree to have it looked into; but if it be to inforce a de-ee, or carry it further, then it opens the cauſe. *Paſch.* 1706. *are* and *Wordall.*

(N) *Bill taken* pro confeſſo.

1. IF the defendant appears to the *ſubpœna*, and prays a fur-ther day to anſwer, and has it, and afterwards ſtands out ll the proceſſes of contempt, the bill will be taken *pro confeſſo*. *Nel. chan. rep.* 65.

2. But if the defendant hath not appeared, the court will not decree the bill to be taken *pro confeſſo*, but will order a ſequeſ-tration againſt his real and perſonal eſtate, until he clears his contempt. 2 *chan. rep.* 283.

3. The defendant being a priſoner in the *King's Bench* refuſed to anſwer; whereupon it was prayed, that the bill might be taken *pro confeſſo*, if he did not anſwer by a certain day; but the court was of opinion, that the bill could not be taken *pro confeſſo*, un-leſs the defendant was in the priſon of the court; whereupon he was removed by *habeas corpus* into the *fleet*, and having a day giv-en him to anſwer, and he ſtill refuſing, the bill was taken *pro con-feſſo*, and he was ordered to be kept cloſe priſoner. *Nel. chan. rep.* 50.

4. A quaker being in contempt for not anſwering upon oath; and he being by order brought to the bar, Ld. Chan. admoniſhed him of the peril of perſevering: but he ſtill refuſing to anſwer on oath, the bill was taken *pro confeſſo*. 29 *Car.* 2. *Anon.* 2 *chan. ca.* 237.

5. The court of policies and aſſurances in *London* having de-creed a bill to be taken *pro confeſſo*, after the firſt ſummons, their decree for this reaſon was reverſed. 1 *Vern.* 223.

CAP. XIII.

Bonds and Obligations.

(A) *Concerning Bonds voluntarily entered into.*
(B) *When the Conſideration of entering into a Bond fails, in what Caſes there ſhall be Relief in Equity.*
(C) *What ſhall be ſaid an illegal Conſideration; and herein of Bonds of Reſignation, Criminal Converſation, and ſuch as deprive a Man of the Benefit of the Law.*
(D) *Unreaſonable Bonds relieved againſt.*
(E) *Bonds given in Fraud of Marriage-Agreements relieved againſt.*
(F) *Marriage-brokage Bonds, what ſhall be void as ſuch.*
(G) *Bonds obtained from young Heirs, in what Caſes to be relieved againſt.*
(H) *Bond and Penalty, in what Caſes moderated in Equity.*
(I) *In what Caſes a Defect in the Bond, or the Want of it, will be ſupplied in Equity.*
(K) *Concerning Co-obligors and Sureties.*

[A] *Concerning Bonds voluntarily entered into.*

1. IF a man enters voluntarily into a Bond, though there was no conſideration; yet, if there was no fraud uſed in obtaining it, the bond ſhall not be relieved againſt in equity. 21 *Car.* 2. *Wright* and *Moor*, 1 *chan. rep.* 157.

*2. But a voluntary bond ſhall not be paid in a courſe of adminiſtration, ſo as to take place of real debts, though by ſimple contract; but ſuch voluntary bond ſhall be paid before legacies (*a*) decreed by *Harcourt* L. C. 23 *Feb.* 1712. *Jones* and *Powell.*

(*a*) S. C. cited by *Talbot* C. in the caſe of *Cray* and *Rocke* (*Talb* c. 153. 2 Eq. ab. 182.) For the bond, although it be voluntary, transfers a right in the life-time of the obligor; but legacies ariſe only from the will, which takes effect only from the teſtator's death, and therefore ought to be poſtponed to a right created in the teſtator's life-time; and this Ld. Chan. added, was expreſly proved by the caſe of *Fairbeard* and *Bowers*, (*vide* title *Creditor and Debtor* (B) pl. 15.) and that this opinion of Lord *Harcourt* was grounded on precedent authorities.

(B) *When*

) *When the Conſideration of entering into a Bond fails, in what Caſes there ſhall be Relief in Equity.*

IF a leſſee aſſigns his leaſe, and the aſſignee, in conſideration of ſuch aſſignment, gives him a bond of 300*l.* conditioned pay him 20*l.* a year, and the rent to the leſſor, and the aſ-nee ſuggeſts, that the leaſe being forfeited (as in truth it was) re is no conſideration; yet if the aſſignee may have the full efit of his agreement, as he had in this caſe, by the leſſor's taking advantage of the forfeiture, he ſhall have no relief. reed 25 *Car.* 2. *Powel* and *Morgan, rep. in chan. Temp.* b. 49.

. If an officer in the army agrees to ſurrender his commiſſion *J. S.* in conſideration of 100*l.* for which a bond is given, and urrenders accordingly, and *J. S.* cannot get himſelf admit-yet *J. S.* ſhall not have relief againſt this bond, ſave only nſt intereſt and coſts. Decreed *Mich.* 1682. *Berriſford* and *e*, 1 *Vern.* 98.

. In a bill to be relieved againſt four bonds entered into by plaintiff's teſtator to the defendant, for quitting his pretence, procuring the plaintiff's teſtator to be admitted purſer of one e King's men of war: It was held *per cur'*, that the bonds d not be ſet aſide, and that they could give no relief, except nterest and coſts, on payment of the principal. *Hil.* 1693. *nds* and *Gibſon*, 2 *Vern.* 308. Quære *of the circumſtances of caſe, for no more of it appears in the book.*

But where a bond was entered into before the wars, condi-d to pay 40*l.* *per ann.* for twelve years, out of the profits of fice, which office was taken away by the uſurpers, but was revived at the King's reſtoration; and it was held, that the or ſhould not be liable for more than the time which the continued. Decreed 17 *Car.* 2. *Lawrence* and *Braſier*, 1 *ca.* 72.

So if a citizen of *London* is ſeiſed and poſſeſſed of houſes of blic title, and likewiſe of a perſonal eſtate, and deviſes ool. to his daughters, and makes his nephew executor, who s into a general recognizance to the chamberlain of *London*, e payment of the 10,000*l.* and the lands of a public title, he reſtoration of the King, revert to the right owner; and erſonal eſtate by the fire of *London* is very much leſſened, ſo t is doubted, whether the whole will make up the 10,000*l.* ecognizance ſhall be made uſe of no farther than to make the value of the teſtator's eſtate, over and above the loſſes e, and the King's return. Decreed *Mich.* 22 *Car.* 2. *Holt olt*, 1 *chan. ca.* 190.

(C) *What*

(C) *What ſhall be ſaid an illegal Conſideration; and herein of Bonds of Reſignation, criminal Converſation, and ſuch as deprive a Man of the Benefit of the Law.*

1. IF a man who has a title to lands applies himſelf to a coun- ſellor, to recover ſuch lands, and the counſellor refuſes unleſs the party will give him a bond, conditioned to give him ha the land when recovered, ſuch bond ſhall be delivered up, and th counſellor ſhall have no more than his reaſonable charges. Decree *Mich.* 32 *Car.* 2. *Scapholm* and *Hart*, *Rep. in chan. Temp. Finch* 477.

2. The defendant, upon his preſenting the plaintiff to a parſon age, took a bond from him to reſign, which, though in itſelf law ful, yet the patron making an ill uſe of it, *viz.* by preventing th incumbent from demanding tithes in kind, the court awarded perpetual injunction againſt the bond. *Mich.* 1686. *Durſton* a *Sandys*, 1 *Vern.* 411. *vide* 1 *Vern.* 131. where it was ſent to b tried at law, whether bonds of reſignation were (*a*) good or no Ld. Chan. ſaying, that precedents in the caſe were not direct to the point.

(*a*) Such Bonds have been held good in law where there appeared to be no corruption or ſimoniacal contract; and that a man m bind himſelf to reſign, as in caſe of plurality, non-reſidence, or till the patron's ſon i age, and qualified to take the benefice: but if it had been for a leaſe of the glebe, tithes, or ſum of money, that had been ſimony within the ſtatute. *Vide Cro. Eliz.* 1 *Cro. Jac.* 248. 4 *Bac. abr.* 470. 471.

* 3. The guardian of an infant preſented to a living, and to a bond from the incumbent to reſign within two months after queſt of the patron or his heirs, it being deſigned that he ſho have the living himſelf, when capable; the patron afterwards d an infant at the Univerſity, leaving two ſiſters, who were his he and they preſſed the incumbent to reſign; and for not doing it, the bond in ſuit, and recovered judgment; and this bill was bro to be relieved againſt the bond and judgment; and it was prove the cauſe that they had treated with the incumbent, to ſell the perpetual advowſon, and had ſaid, that if he would not 700*l.* for it, they would make him reſign. *Per* Ld. K. The in this caſe lies on the defendants part, and unleſs they mak ſome good reaſon for removing him, I ſhall certainly decree ag the bond. Bonds for reſignation have been held good in law: ſtatute of 31 *Eliz.* againſt ſimony, made the penalty upon th patron; and I do not remember any caſe of reſignation-bond fore that ſtatute, and they have been allowed ſince, only to ſerve the living for the patron himſelf, or for a child, or t ſtrain the incumbent from non-reſidence, or a vicious cou life; and if any other advantage be made thereof, it will the bond; and where it is general, for reſignation, yet ſome cial reaſon muſt be ſhewn to require a reſignation, or I wil ſuffer it to be put in ſuit; if it ſhould not be ſo, ſimony w committed without proof or puniſhment; a particular agree muſt be proved, to reſign for the benefit of the friend that w be preſented; and without ſuch agreement the bond ough

to be ſued, but for miſbehaviour of the parſon; and here are proofs in this caſe of endeavours to get money out of the plaintiff; and decreed a perpetual injunction againſt the bond, and ſatisfaction to be acknowledged upon the judgment; and the plaintiff to give a new bond of 200*l.* penalty to reſign; but that not to be ſued without leave of the court. *Mich.* 1701. *Hilliard* and *Stapleton.*

4. If a bond is given to a houſe-keeper for ſecret ſervice, and it does not appear ſhe was a common ſtrumpet, equity will not relieve againſt it. *Mich.* 1691. *Bainham* and *Maning*, 2 *Vern.* 242.

5. But if it appears that there was *turpis contractus*, and that the woman uſed to practiſe after that manner, and uſed to draw in young gentlemen, equity will relieve. 1 *Vern.* 483. *vide* 2 *Vern.* 187. where it is ſaid, that though the court may refuſe relief, when the party who is culpable makes his application; yet it is otherwiſe when his executor ſues.

6. The late Marquis of *Anandale* having had criminal converſation with the defendant, his houſe-keeper, for two years, and having a child by her, who afterwards died, the Marquis gave a bond of 4000*l.* penalty, conditioned to pay her 2000*l.* within three months after his death; and ſome time after the Marquis executed a deed, whereby he agreed, either to pay the 2000*l.* or to lay it out in an annuity, and ſettle it on the defendant *Harris* and her child; and the Marquis being dead, and this bond put in ſuit, this bill was brought to be relieved againſt the bond, as being given *pro turpi cauſa*; and the defendant's croſs-bill was for a diſcovery of aſſets, and payment of the 2000*l.* and the court diſmiſſed the original bill, and decreed an account and ſatisfaction for the defendant on her croſs-bill, as being *præmium pudoris*; and a caſe was cited of *Ord* and *Blackett*, 9 *Mod.* 116. 2 *Eq. abr.* 487. where Mrs. *Ord*, a young lady of about fourteen years of age, and intitled to 12,000*l.* fortune, was ſeduced by Sir *William Blackett*, who ſettled on her 300*l.* *per ann.* for life; and the young lady had a decree for the 300*l.* as *præmium pudicitiæ:* So in a like caſe in the Exchequer about a year ago, where a man having debauched a young woman, and intending afterwards to put a trick on her, made a ſettlement upon her of 30*l.* a year for life, out of an eſtate which he had nothing to do with; yet the court decreed him to make it good out of an eſtate which he had of his own. This decree was afterwards affirmed on appeal to the Houſe of Peers. *Hil.* 1727. *The Marchioneſs of Anandale* and *Harris.* 3 *Br. Par. c.* 445.

2 *Will. Rep.* 432, S. C. *Cray* and *Rooke*, *Eq. abr.* 182. Talb. c. 153.

7. If a man who is made tenant in tail enters into a recognizance not to ſuffer a recovery, ſuch recognizance ſhall be delivered up, as creating a perpetuity. *Moor* 809. Adjudged upon a reference to the judges out of chancery.

8. So if one ſettles his land upon his daughter in tail, and takes a bond from her not to commit waſte, and the daughter levies a fine, and commits waſte, and the bond is put in ſuit; yet equity will relieve againſt it. *Hil.* 1691. *Jervis* and *Bruton*, 2 *Vern.* 251.

9. But where the father ſettled lands on his ſon in tail, and took a bond from him that he ſhould not dock the intail. On a bill to be relieved againſt the bond, it was decreed to be good; for if the ſon would not have given the bond, the father might have only made him tenant for life. *Trin.* 1691. *Freeman* and *Freeman*, 2 *Vern.* 233.

Fre in Chan. 28.

(D) *Un-*

(D) *Unreaſonable Bonds relieved againſt.*

1. THE plaintiff, for 90*l.* lent, got a bond of 800*l.* from the defendant, when he was drunk, and had judgment thereon; the defendant, in right of his wife, was intitled to certain lands that were eſtated in other perſons in law, in truſt for her; the bill was to have thoſe lands ſubjected to the plaintiff's ſatisfaction here, in as much as the defendant was intitled to the truſt in the right of his wife; but the court would not give the plaintiff any relief, not ſo much as for the principal he had really (*a*) lent; and the bill was diſmiſſed. *Paſc.* 23 *Car.* 2. *Rich* and *Sydenham*, 1 *chan. ca.* 202.

(*a*) But if the defendant, in this caſe, had come into equity to ſet aſide the judgment for fraud, equity would have obliged him to pay the plaintiff what was really lent, according to that maxim, *He that would have equity done him, muſt do it to others.*

2. A man who had fallen out with his mother, ſettled his manſion-houſe on his brother, but firſt took a bond from him in his ſiſter's name, that the brother ſhould not permit his mother to come into the houſe; and the bond was decreed to be ſet aſide. *Mich.* 1686. *Traiten* and *Traiton*, 1 *Vern.* 413.

(E) *Bonds given in Fraud of Marriage Rights and Agreements relieved againſt.*

1. IF *A.* on a treaty of marriage of his ſiſter with *B.* lets her have 160*l.* privately, that her fortune may appear as much as was inſiſted upon by *B.* and takes her bond to repay it, and the executor of *A.* puts the bond in ſuit againſt the executor of the ſiſter, who ſurvived the huſband, the bond ſhall be given up as fraudulent. Decreed between *Gale* and *Lendo*, 1 *Vern.* 475. *Note*, It is laid down as a rule in equity, that where the ſon, without the privity of the father or parent treating the match, gives a bond to refund any part of the portion, it is void. 1 *Salk.* 156.

Pre in Chan. 522, 165, 267. *Lucas's rep.* 445. 1 *Will. rep.* 496, S. C. The bond will not be made better by being aſſigned to creditors: and ſays *Mich.* 1719. *Parker* C. affirmed the decree made by the maſter of the rolls, ſaying, That theſe private agreements were highly to be diſcouraged. See the caſe of *Roberts* and *Roberts*, 2 Eq. abr. 185, and 3 P. W. 66. 1 Vern 348, 475. Str. 240. 1 Br. Parl. c. 57, 60.

2. If on a treaty of marriage between *A.* and the daughter of *B.* the mother of *A.* ſurrenders part of her jointure to enable her ſon to make a ſettlement, and *B.* agrees to give his daughter 3000*l.* portion; and *A.* without the privity of his mother, gives a bond to *B.* to pay back 1000*l.* at the end of ſeven years, the bond ſhall be delivered up as obtained in fraud of the marriage-agreement. Decreed *Mich.* 1718. by the maſter of the rolls, and *Mich.* 1719. affirmed by Ld. Chan. *Turton* and *Benſon*, 2 *Vern.* 764.

* 3. But where a ſon, in conſideration of 3500*l.* which he was to have as a marriage-portion with *B.* his intended wife, covenanted that his father would ſettle 300*l. per ann.* on her as a jointure; and the father ſettled it accordingly; and the ſon gave a bond to leave his wife 1000*l.* if ſhe ſurvived him; the ſon died, and the father pretended the wife ought not to have any benefit of this bond, for that it was in fraud of the marriage-agreement; and cited the caſe of Sir *Nicholas Butler* and Sir *Henry Chancy*, where,

on

the marriage of Sir *Henry*'s ſon with Sir *Richard*'s daughter, was agreed, that the young couple ſhould have ſo much for preſent maintenance; the ſon privately agrees with his father to releaſe part of it; and that was ſet aſide, though there the ſon, as was ſaid, gave nothing but his own, and he might diſpoſe of his preſent maintenance as he thought fit; ſo here the ſon gives nothing but his own money: But *per cur'*, the caſes are not alike; there the father was party to the articles, and deceived by the under-hand agreement contrary to the articles; but here the ſon is only party to the articles, and was to have all the portion, and might give it as he pleaſed; and decreed that there ſhould be no relief. *Mich.* 1699. *Gifford* and *Gifford.*

4. If a bond is given in common form for the payment of money; but proved that the conſideration was, that the obligor ſhould marry ſuch a man, or ſhould pay the money due on the bond, the court will relieve againſt it, for marriage ought to be free, and without compulſion. Adjudged *Trin.* 1689. *Key* and *Aldſhaw*, 2 *Vern.* 102.

5. So if *A.* being a widow, gives a bond to *B.* of 100*l.* if ſhe marry again, and *B.* gives a bond to the widow, to pay her executors the like ſum, if ſhe ſhould not marry again; and the widow ſoon after marries, her bond ſhall be delivered up. Decreed 1690. *Baker* and *White*, 2 *Vern.* 215.

(F) *Marriage-Brokage Bonds, what ſhall be void as ſuch.*

IF *A.* gives *B.* a bond of 100*l.* for procuring him a wife, which is effected accordingly, ſuch bond ſhall be cancelled. *Toth. chan. rep.* 87, S. P. decreed; 3 *chan. rep.* 31, S. P. decreed.

The plaintiff gave a bond to the defendant, conditioned, that if the plaintiff married *J. S.* then the plaintiff to pay a certain ſum of money; the defendant procured the marriage, and ſued the bond in ſuit; but it was decreed to be delivered up, the young gentlewoman having 2000*l.* portion, and the man being 40 years of age, and having ſeven children. *Paſc.* 2 *Jac.* 2. *Cary* and *Hook*, 2 *chan. ca.* 176. 1 *Vern.* 412, S. C.

It was decreed in Chancery, that a bond of 1000*l.* penalty, for payment of 500*l.* given for the procuring a marriage between perſons of equal rank, fortune, &c. was good; but upon an appeal to the Houſe of Lords the decree was reverſed; for that ſuch bonds to match-makers are of dangerous conſequence, and tend to the betraying and ruining perſons of fortune and quality, and are not to be countenanced in equity; and that marriage ought to be procured by the mediation of friends and relations; and that ſuch bonds would be of evil example to executors, guardians, parents, ſervants, and others who have the care of children. *Shaw* and *Potter*, *Show. P. C.* 76.

Mr. *Dairell*'s maid had prevailed with his niece (who was under 15 years old, and lived in the ſame houſe with him, and was likely to a good fortune) to marry his journeyman, without the conſent or knowledge of her uncle; and for the good offices ſhe had done him in that affair, he had given her a bond of 100*l.* conditioned

conditioned to pay her fifty guineas at six months end; and after h had got the niece's good-will, by the help of this maid, and sh had been prevailed with to go into a hackney-coach with him, i order to marry him, he gave the maid fifty guineas more; t marriage was had, and the bond not being paid, was put in suit and judgment obtained on it; and this bill was brought againſt th defendants (the maid having married *Bruning*) to be relieved agai this bond, and to have the fifty guineas repaid; for that the bo was entered into, and the money given for no good consideratio but only on account of this marriage-brokage: And the maſter the rolls decreed the bond to be given up, and ſatisfaction to b acknowledged on the judgment, and the fifty guineas received to repaid; and if it were not done on ſervice of the order, the de fendants were to pay coſts; and this notwithſtanding the huſban inſiſted by his anſwer, that he looked upon this as his wife's fa tune, and had married her in proſpect of it; and this decree w affirmed by Ld. K. *Wright*. *Mich.* 1700. *Goldſmith* and *Brun*

5. If a bond is given to a father, in order to obtain his conſe to the marriage of his daughter, to repay part of the portion, the daughter died without iſſue, where the daughter was intitl to her portion by a collateral anceſtor, the bond will be ſet a as a marriage-brokage bond. Decreed *Mich.* 1707. *Keat* a *Allen*, 2 *Vern.* 588.

1 *Will. rep.* 118. *Eaſter* 1710, S. C. mentions it as a releaſe to be given within two years after the marriage, in purſuance of a covenant in the marriage-articles, which were agreed on with g deliberation; and that *Cowper* C. relieved againſt this covenant, ſaying, That to tole ſuch an agreement would be paving a way to guardians to ſell infants under their w ſhip.

6. If the mother, who is guardian to her daughter, takes a bo from the huſband, to give her a releaſe within two years after t marriage, ſuch bond is of the ſame nature with a marriage-bro age bond, and ſhall be delivered up; for there is no differe between giving a bond for procuring a marriage, and a bond releaſe part of what became due. Decreed 8 *Ann. Duke Hami* and *Lord Mohun*, 2 *Vern.* 652. 1 *Salk.* 158, S. C.

(G) *Bonds obtained from young Heirs, in what Ca to be relieved againſt.*

1. IF *A.* lends *B.* and *C.* 200*l.* and they enter into a bon him of 1000*l.* to pay him 800*l.* within three months a either of their fathers died, or they were married. *C.*'s father d and *B.* marries, and his portion is in the hands of truſtees, ſhall not ſubject the portion for the payment of the debt, it b an (*a*) unreaſonable ſecurity. 3 *chan. rep.* 75.

(*a*) Thoſe hazardous bargains with young heirs, to have double or treble the ſum lent, after the death of father, or a tenant for life, or ſome other contingency, are not always ſet aſide in equi reaſon of neceſſity or prodigality in them, for then it would be very difficult to deal any young heir in the life of his anceſtor; but if they appear to be very unreaſonabl are attended with badges of fraud, which are the things which muſt in all caſes g them; then they are regularly ſet aſide; but then it muſt be by paying what wa *ſide* lent, together with intereſt, in moſt caſes, if the obligor applies for relief; but i the obligee applies, he ſhall have no aſſiſtance, not even to recover what was really becauſe that would be to aſſiſt fraud in equity. *vide* 1 *Vern.* 141. 2 *Vent.* 359.

Rep. Temp. Finch 295, S. C. under the name of *Waller* and *Dale*, *Eaſter* 29 *Car.* 2. decreed, that upon payment of the 200*l.* and intereſt, the b be delivered up. 2 Vern. 78. *Whitley* and *Price*, S.P. *Trin.* 1688. *vide* 1 Vern. 467. P

2. A young gentleman, and two others, employed one borrow 500*l.* *B.* employed *C.* who ſpoke to *D.* a ſilkman, bought of him ſilks for 500*l.* *A.* gave a bond and judgment fo money, and *B.* ſold the ſilks for 250*l.* and kept 50*l.* for hi

and *C.*'s pains, and paid but 200*l.* to *A.* and it was decreed that the bond ſhould be given up upon payment of the 200*l.* and intereſt; but the reporter makes a *quære* as to intereſt. 28 *Car.* 2. *Waller* and *Dalt*, 1 *chan. ca.* 276. *Rep. Temp. Finch* 314. *Mich.* 29 *Car.* 2. *Fairfax* and *Trigg*, S. P. decreed; and the court would not give intereſt.

3. The defendant being an exchange-man had for many years paſt practiſed on young heirs, by ſelling them goods at extravagant values, and to be paid five for one, and more, on the death of their fathers; and had in that manner obtained from the plaintiff, and two other young gentlemen that were heirs to good eſtates, ſeveral ſecurities, wherein they were bound ſeverally and jointly in 4000*l.* for payment of great ſums of money; and the court decreed the plaintiff's ſecurity to be given up on payment of what the defendant really and *bona fide* paid to him alone, and for his own proper uſe. *Trin.* 1687. *Bill* and *Price*, 1 *Vern.* 467. 2 *Vern.* 78. *Trin* 1688. *Whitley* and *Price*, S. P. and 2 *Vern.* 77. *Trin.* 1688. *Lamplugh* and *Smith*, S. P. & 1 Vern. 4.

4. *A.* tenant for life, remainder to his firſt ſon in tail, remainder to his nephew *B. B.* enters into ſeveral ſtatutes to *C.* for payment of ten for one upon the death of *A.* in caſe he died without iſſue male in the life of *B. C.* in the life of *A.* brings a bill to compel *B.* either to pay the principal and intereſt, or be foreclоſed any relief againſt the bargain; *B.* by anſwer declares the bargain fairly made, and intends to abide by it, and that he would ſeek no relief againſt it. *A.* dies, and *C.* being dead, *B.* brings his bill againſt the executor of *C.* and notwithſtanding *B.*'s former anſwer, he is relieved againſt the bargain on payment of principal and intereſt, without coſts; and Lords Commiſſ. declared, That there being no further proceeding than the bill and anſwer, that was only to double hatch the cheat. Decreed *Hil.* 1690. *Wiſeman* and *Beake*, 2 *Vern.* 121. 2 *Freem.* 111. S. C. and decree accordingly.

(H) *Bond and Penalty, in what Caſes moderated in Equity.*

Vide for this head 3 *Bac. abr.* 691.

1. IF the obligee has received the greateſt part of the money due on the bond, at the peremptory time and place, and will nevertheleſs extend the whole forfeiture immediately, refuſing, ſoon after the default, to accept of the reſidue tendered to him, the obligor may find aid in Chancery. *Cary* 2.

2. If the plaintiff gives the defendant a bond of 20*l.* not to diſparage his trade, and the plaintiff afterwards ſeeing a cuſtomer of the defendant's cheapening a parcel of flounders, ſays unto him, *Why would you buy of the defendant? theſe fiſh ſtink*; and the defendant puts the bond in ſuit, and has a verdict, equity will not relieve, becauſe of the ſmallneſs of the ſum (*a*) But *per* Ld. K. it would be otherwiſe were the penalty greater, as 100*l.* or upwards (*b*). *Mich.* 22 *Car.* 2. *Tale* and *Ryland*, 1 *chan. ca.* 183.

(*a*) For the coſts here and at law would exceed the penalty.

(*b*) It is a common caſe to give relief againſt the penalty of ſuch bonds to perform covenants, &c. and to ſend it to a trial at law, to aſcertain the damages in a *quantum damnificat'*. *Vide* 1 *Sid.* 442. and *Max. of Eq.* 51. pl. 13.

3. The plaintiff being in execution, the defendant would not diſcharge him without payment of the (*c*) penalty of the bond, which he having done, the court decreed the defendant to refund all, except principal, intereſt and coſts. *Rep. Temp. Finch* 437.

(*c*) But now by the 4 & 5 *Ann. cap.* 16 the defendant, pending any action on a bond, may bring in principal, intereſt, and coſts in law and equity, and the court ſhall give judgment to diſcharge him.

4. If

4. If one is bound by bond to transfer 300*l.* *Eaſt India* ſtock, before *September* the 30th then next; tho' the ſtock is much riſen, yet the defendant ſhall be decreed to transfer the 300*l.* ſtock *inſpecie*, and to account for all dividends from the time that it ought to have been transferred. *Gardner* and *Pullen*, 2 *Vern.* 394.

5. If the vender of lands enters into a recognizance of 1000*l.* penalty, for the quiet enjoyment of the vendee, tho' the loſs the vendee ſuſtains by having the land evicted be much greater; yet the court will not go beyond the penalty of the bond. 1 *Chan. rep.* 95.

6. So if a maſter of a ſhip covenants with the *Eaſt-India* company to pay a certain mulct for every cloth, &c. carried in the ſhip, and the maſter takes *J. S.* as his mate, who makes the like agreement with him, *mutatis mutandis*, and gives a bond of 50*l.* penalty, that he ſhould not carry cloth, &c. though *J. S.* without the knowledge of the maſter, carries ſo many cloths that the mulct came to 70*l.* and the maſter is obliged to pay it; yet he ſhall not, on his own application, charge *J. S.* for more than the penalty of the bond. 1 *chan. ca.* 226.

7. So where there was a ſettlement or deviſe for payment of debts, and there was a bond-debt due, the intereſt of which had out-run the penalty, although ſuch conveyances for payment of debts are conſtrued favourably; yet the creditor on a bill brought by him could not have more than the penalty. 1 *Salk.* 154. decreed. For note, *That where an obligee is plaintiff, a court of equity will not carry the debt beyond the penalty, becauſe he has choſen his own ſecurity, and has made himſelf judge what recompence he ſhall have, in caſe the debtor pays him not, or performs not his agreement; and there is no equity that his ſecurity ſhould be enlarged or bettered for him; but when he is defendant he hath the maxim in the margin on his ſide*; and therefore,

Max. He who will have equity done to him, muſt do it to the ſame perſon.

8. If lands are extended on a ſtatute or judgment, at much leſs than the real value, and the conuſor will come into equity, to make the conuſee account according to the real value, he ſhall not be relieved without paying the conuſee all that is due to him for principal, intereſt and coſts, tho' they exceed the penalty. 1 *Vern.* 350.

9. So if the obligee be delayed by injunction. *Ibid.*

10. So where the plaintiff came to be relieved againſt the penalty of a bond, tho' it was ſo decreed; yet it was on the payment of principal, intereſt and coſts; and tho' they (*a*) exceed the penalty, yet the decree was affirmed in the Houſe of Peers. *Show. P. C.* 15.

(*a*) And this ſeems to be the reaſon why an obligee, who enters up judgment, but does not take out execution, ſhall, notwithſtanding, have principal and intereſt from the time of entering up the judgment; for tho' after judgment entered, he is not intitled to intereſt at law; yet, as he is intitled to the penalty by law, equity will not relieve againſt it without paying principal, intereſt and coſts.

(I) *In what Caſes a Defect in the Bond, or the Want of it, will be ſupplied in equity.*

1. IF one of the obligors names is omitted by the ſcrivener to be inſerted in the bond, and yet he ſigns and ſeals the bond, ſuch an accident is proper to be relieved againſt in equity. *Per Cowper* L. C. 3 *Chan. rep.* 99.

2. If for 200*l.* borrowed the obligor enters into a penal bond for 400*l.* but the clerk, inſtead of *quadringenta libris*, writes *quadraginta libris*, yet it ſhall be good. 2 *chan. ca.* 225.

3. If

3. If a bond is taken away fraudulently, and cancelled, the obligee ſhall have as much benefit by it, as if it were not cancelled. *Rep. Temp. Finch* 184.

4. If a grantee in a voluntary deed, or obligee in a voluntary bond, loſe the deed or bond (*a*), they ſhall have remedy againſt the grantor or obligor in equity (*b*). 1 *Chan. ca.* 77. *Quere*, for theſe matters are diſcretionary.

(*a*) Where it is neceſſary to make Affidavit of ſuch loſs *vide* Title *affidavit* (A) *Pl.* 1, 2, 3, 4. (*b*) For the court of requeſts was prohibited to grant relief in ſuch a caſe. 1 *Rol.* 375. *Pl.* 1. *Lat.* 24.

*5. *J. S.* a little before his death, entered into a voluntary bond to his houſe-keeper for the payment of an annuity of 30*l. per ann.* and the bond being loſt, his repreſentatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her (*c*). *Hil.* 1700. *Lightbone* and *Weeden.*

(*c*) *Maxim*, equity relieves againſt accidents.

(K) *Concerning Co-obligors and Sureties.*

1. IF two are bound jointly, and one dies, the ſurvivor only is liable in equity; but it is otherwiſe if they were bound jointly and ſeverally. 2 *Vern.* 99. *per Cur'.*

2 An obligee ſhall have remedy againſt a ſurety, where the bond is loſt, eſpecially if the money was lent on the ſurety's credit. 1 *Chan. ca.* 77.

3 Bac. abr. 700.

3. But if upon the taking out adminſtration two are bound as ſureties, and afterwards the ſureties take up their bond, and procure the prerogative court to take inſufficient ſecurity; yet they ſhall not be any farther chargeable in equity than in law. *Ratcliffe* and *Groves*, 1 *Vern.* 196. That a ſurety ſhall not be further liable in equity than at law, *vide* 2 *Chan.* 22.

4. If the principal in a bond, being arreſted, gives bail, and judgement is had againſt the bail; and the ſureties are afterwards ſued on the original bond, and are obliged to pay the money, the ſureties ſhall have the judgment againſt the bail aſſigned to them, in order to re-imburſe them what they had paid, with intereſt and coſts; and the ſureties in the original bond are not to be contributory, for the bail ſtands in the place of the principal. *Paſch.* 1708. *Parſons* and *Briddock*, 2 *Vern.* 608.

*5. A bond-creditor ſhall, in this court, have the benefit of all counter-bonds or collateral ſecurity given by the principal to the ſurety; as if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* ſhall have the benefit of it to recover his debt. *Mich.* 1692. *Maure* and *Harriſon.*

3 Bac. abr. 700.

*6. If *A.* be bound in a bond for payment of money, and *B.* be bound with him as his ſurety only, and the bond happens to be loſt, equity will ſet up the bond, as well againſt a ſurety as againſt the principal, becauſe the bond was once a legal charge againſt both. Decreed 1700. *Sheffield* and *Lord Caſtleton.*

CAP.

CAP. XIV.

Charity.

(A) *What ſhall be a good charitable Uſe.*
(B) *What ſhall be a ſuperſtitious Uſe, or a Charity to which the King is intitled.*
(C) *Where a Defect, with reſpect to the lands or goods appointed, or the Perſons to take, ſhall be ſupplied in favour of a Charity.*
(D) *What ſhall be ſaid to be appointed to a Charity, and whoſe Perſons and Eſtates made liable.*
(E) *What ſhall be a Miſ-employment of a Charity, as by altering it from the Donors Intentions; not increaſing the Rents as the price of Things increaſes,* &c.
(F) *Concerning Commiſſioners of charitable Uſes.*

(A) *What ſhall be a good charitable Uſe.*

1. IF a ſchool-houſe is erected by the voluntary contributions of the inhabitants of *A.* on the waſte of the lord of the manor, and the lord infeoffs truſtees in truſt that the inhabitants of *A.* may for ever have a ſchool, as of the gift of the lord of the manor; this is not a free-ſchool, and ſo not a charity within the ſtatute of 43 *Eliz.* for which the inhabitants have a right to ſue in the attorney general's name. 2 *Vern.* 387.

2. So if the lord of a manor ſhould erect a mill, and convey it to truſtees, to the intent that the inhabitants might have the convenience of grinding there; this would not be a charity within the (*a*) ſtatute. *per* Ld. K. 2 *Vern.* 387.

(*a*) The 43 of *Eliz. cap.* 4. enacts, that the commiſſioners ſhall inquire of the following uſes as good and charitable, *viz.* for relief of aged and impotent, and poor people; for maintenance of ſick and maimed Soldiers, ſchools of learning, free ſchools, ſcholars in univerſities, houſes of correction; for repairs of bridges, of ports and havens, of cauſeways, of churches, of ſea banks, of highways; for education and preferment of orphans, for marriage of poor maids, for ſuppo:tation and help of young tradesmen, of handicraftſmen, of perſons decayed; for redemption or relief of priſoners or captives, for eaſe and aid of poor inhabitants concerning payment of fifteenths, ſetting out of ſoldiers, and other taxes for other things within the purview of the ſtatute. *Vide Duke's Char. Uſes* 109.

3. If money is given to maintain a preaching miniſter, tho' this s no charitable uſe (*a*) mentioned in the ſtatute; yet *per* Ld. K. nd two judges, it is within the equity of the act; and it was rdered to be paid accordingly. *Pop.* 139.

(*a*) A gift of lands, &c. to a chaplain or miſter, to celebrate divine ſervice, is neither within the letter nor meaning of this ſtatute: r it was on purpoſe omitted in the penning of the act, leſt the gifts intended to be employed pon purpoſes grounded on charity, might in change of times, contrary to the minds of the vers, be confiſcate into the kings' treaſury: for religion being variable, according to the eaſure of ſucceeding princes, that which at one time is held for orthodox, may at another be accounted ſuperſtitious; and then ſuch lands are forfeited, as appears by the ſtate of 1 *E.* 6. *c.* 14. Sir *Fran. Moor's* reading on the ſtatute 43 *Eliz.* c. 4. but it has been ıled otherwiſe: for *ſumma eſt ratio quæ pro religione facet.*

4. An impropriator deviſed to one that ſerved the cure, and to ll that ſhould ſerve the cure after him, all the tithes and other rofits, &c. tho' the curate was incapable of taking by this deviſe, ſuch manner, for want of being incorporate and having ſucceſon; yet Lord *Finch* held, that the heir of the deviſee ſhould be iſed in truſt for the curate for the time being. 2 *Vent.* 349.

5. A deviſe of lands to the company of leather-ſellers in *Lon-*, to maintain a charitable uſe there, was, upon an appeal to Ld. an. held good, notwithſtanding the ſtatute of wills prohibits the eviſing to a corporation in mortmain; and there ſaid, that there ere ſeveral precedents of the kind. *Duke's char. uſes* 80.

6. So if there be a deviſe to the principal, fellows and ſcholars *Jeſus College* in *Oxon*, and their ſucceſſors, to find a ſcholar of s blood; tho' this deviſe be void in law, becauſe the ſtatute of 4 *H.* 8. of wills, diſallows of deviſes to corporations in mortain; yet it ſhall be good, as a limitation and appointment to a arity, within the 43 *Eliz. De Layd's* caſe, *Hob.* 136.

7. So where a deviſe was of lands to *Trinity College* in *Camidge*, for the maintenance of a fellow there; and if any cavil ould hinder this deviſe, or that the ſame cannot go to the college reaſon of the ſtatute of mortmain, then he deviſed the ſame to *S.* and his heirs; and upon an information exhibited by the atrney general, to have this land eſtabliſhed in the college, it was creed accordingly, notwithſtanding the ſaid ſtatute and the ſaid auſe in the will. 1 *Lev.* 284. *the King* verſus *Newman, in Canc'.*

(B) *What is a ſuperſtitious Uſe, or a Charity to which the King is intitled.*

IF any lands, tenements, rents, goods, chattels, &c. have or ſhall be given towards the finding a ſtipendiary prieſt, for aintenance of an anniverſary or obit, lamps or torches, &c. to uſed at certain times, to help to ſave the ſouls of men out of ppoſed purgatory; theſe are ſuperſtitious uſes, which are given the king. *Vide* the ſtatute 1 *E.* 6. *c.* 14. *Cro. Jac.* 51. 4 *Co.* 104. *ke's char. uſes* 106.

2. But if there be a charitable uſe intermixed with the ſuperſtious uſe, ſo that they may be diſtinguiſhed, there the king ſhall ve only ſo much as is given to the ſuperſtitious uſe. 4 *Co.* 104.

3. If lands are given upon condition to find a prieſt, this is a perſtitious uſe within the words. *Ibid.*

4. If

4. If lands are limited to a man's kindred, to pay certain sums of money to superstitious uses, the king shall have the lands; but if it had been so limited, that his friends or kindred should have the residue of the profits above the superstitious use, this had saved the land, *Duke's char. uses* 106. and the king should only have the sums of money thus limited.

5. If one gives 20*l. per ann.* for the finding of a priest, and appoints to the priest 10*l. per ann.* in this case all shall go to the king; for the residue shall be intended for the finding of necessaries; otherwise it is, if a condition be annexed to the gift to give 10*l. per ann.* to a priest: for there the king shall have but 10*l.* *Duke's char. uses* 107.

6. An inquisition having found that one *A.* had devised to *J. S.* and her heirs absolutely, without any trust, that she did it for the good of her soul; and that the devisee owned that this estate was not hers, but belonged to god and his saints: and the court of *K. B.* held, that this could not be averred to be a superstitious use by reason of the statute of frauds; and said, that a monk may take now by purchase, and seemed to think so of a nun: But an information being preferred in the exchequer for a discovery, and an application of the devise to an use truly charitable, it was held that the statute of frauds did not bind the king; that he, as head of the commonwealth, is intrusted and impowered to see that no thing be done to the disherison of the crown, or the propagation of a false religion; and to that end intitled to pray a discovery of a trust to a superstitious use: and that this being a superstitious use, the king shall order it to be applied to a proper use. 4 W. & M. between *the King* and *Lady Portington*, 1 *Salk.* 162. 3 *Salk.* 33[illegible]

7. If a charity is devised to the poor indefinitely, the king shall have the disposal thereof. *Rep. Temp. Finch* 245.

8. *A.* having devised 1000*l.* to be applied to such charitable uses as he had by Writing under his hand formerly directed, and no such writing being to be found, it was held that the king should appoint who gave it to the mathematical boys in *Christ's Hospital*; which was decreed accordingly; and that the parties should be indemnified from the writing referred to. *Hil.* 1683. between *the Attorney General* and *Syderfin*, 1 *Vern.* 224.

9. *A.* being a beneficed clergyman, devised 600*l.* to Mr. *Baxter* to be distributed by him to sixty *pious ejected ministers*, and adds, that he did not give it them for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want: he also gave Mr. *Baxter* 20*l.* and 20*l.* more to be laid out in a book of his, intitled, *Baxter's Call to the Unconverted*, and it was held by *North* Ld. K. that this was a superstitious use which though void, yet the charity is good, and shall be applied to *eodem genere*; and therefore decreed it for the maintenance of a chaplain for *Chelsea College*. *Trin.* 1694. between *The Attorney General* and *Baxter*, 1 *Vern.* 248. But this decree was reversed 1 *W. & M.* by Lds. Commiss. 2 *Vern.* 105.

10. *A.* devised a salary for maintenance of independent lecturers in three market-towns, and devised the estates thus charged to his nephew, who afterwards devised it for the payment of his debts; a bill was brought to have the lands sold for payment of the debts, and afterwards upon an information for the charity, the growing

payment

payments and arrears were decreed, and the independent lectures changed into catechiſtical lectures in the ſame three market-towns; and this, though there was not ſufficient to pay the debts. *Combe's* caſe, ſaid to be decreed 1679. 2 *Vern.* 267.

11. *A.* by will charged his eſtate with an annual ſum for the maintenance of *Scotchmen* in the univerſity of *Oxon*, to be ſent into *Scotland* to propagate the doctrine of the church of *England* there; and preſbyters being ſettled in *Scotland* by act of parliament, the queſtion was, whether this deviſe ſhould be void, and ſo fall into the eſtate and go to the heir, or ſhould be applied *cy pres*; but there is no reſolution. *Paſc.* 1692. *The Attorney General* and *Guiſe*, 2 *Vern.* 266.

(C) *Where a Defect, with reſpect to the Lands, Goods, &c. appointed, or the Perſons to take, ſhall be ſupplied in Favour of a Charity.*

1. AN appointment of lands to a charity will be good, though there be neither livery of ſeiſin nor attornment. *Duke's char. uſes* 109, 110.

2. If a debt owing by ſtatute, bond, judgment, or recognizance, which in law is a thing in action, is given for the creation of a free-ſchool, this ſhall be a good appointment within the ſtatute to maintain a charitable uſe. Decreed 3 *Car.* 1. *Ibid.* 79.

3. If copyhold lands are deviſed to a charity, they ſhall paſs without any ſurrender, and ſhall bind the heir; but the lord ſhall not loſe his fine. *Ibid.* 110.

4. Tenant in tail may deviſe lands to a charity, and ſuch deviſe ſhall be good, though there was neither fine or recovery. *ibid.* 100. 2 *Vern.* 453, S. P. decreed.

5. If a feme covert adminiſtratrix deviſes to a charity, it ſhall be good. *Damus's* caſe, *Moor* 822.

6. But if an infant, lunatic, or feme covert, do by will or by deed give any thing to a charitable uſe it ſhall be void. *Duke's char. uſes* 110.

7. If *A.* deviſe freehold lands to a charity, but the will is not executed in the preſence of three witneſſes, according to the ſtatute of frauds, this will being void, ſhall not operate as an appointment. *Mich.* 1707. *Attorney General* verſus *Barnes*, 2 *Vern.* 597. 1 *Salk.* 163; S. P. 2 *Vern.* 597. *Pre. in Chan.* 270, 389. *Gilb. rep.* 5. *vide Jenner & Harper*, 2 Eq. abr. 191. 3 Bl. Com. 273. 1 P. W. 247. 3 Atk. 141.

8. If lands are given to church-wardens of a pariſh to a charitable uſe, although the deviſe be void in law, they not having a corporation capable of taking in ſucceſſion; yet they ſhall be capable for this purpoſe: decreed. *Duke's char. uſes* 82.

9. If lands are deviſed to a corporation by a wrong name, as to the mayor and chamberlain, inſtead of mayor and commonalty; yet, as the intent of the teſtator appears, it ſhall be good. *Mayor of London's* caſe, *ibid.* 83.

10. If money is given to a pariſh generally, it ſhall be intended to be to the poor of the pariſh. 1 *chan. ca.* 134.

11. Money was given for the good of the church of *Dulk*; and this was resolved to be a good gift, notwithstanding these general words. *Duke's char. uses.*

12. If one devise lands to *A.* for life, remainder to the church of St. *Andrew* in *Holborn*; in this case the parson of the church shall have this remainder. *ibid. vide* 2 *Eq. ab.* 293. 2 P.W. 125.

(D) *What shall be said to be appointed to a Charity, and whose Persons and Estates made liable.*

1. IF one devises the rents of his land to a charitable use, by this the land itself is devised; so a devise of the rents and profits. *Duke's char. uses* 112.

2. If a man who has made a lease of his lands, devises the rent to a charity, this shall be construed largely for a devise of the rent then reserved, or afterwards to be reserved on an improved value. *ibid.* 71.

3. If *A.* seised of a manor of the yearly value of 240*l.* devises several legacies, and particularly to his heir at law 40*s.* and then adds, *That being determined to settle for the future, after the death of me and my wife, the manor of* F. *with all lands, woods and appurtenances, to charitable uses, I devise to* M. N. &c. *upon trust, that they shall pay yearly, and for ever, several particular sums to charitable uses, amounting in the whole to* 120*l.* per annum, and gives the trustees something for their pains. And there being an overplus, it was decreed to go in augmentation of the charities, it appearing to be the testator's intent to settle the whole manor; and that the heir should have no more than the 40*s.* *Arnold* and *Attorney General, Show. P. C.* 22. *in domo proc'*, affirmed on appeal.

4. If two executors jointly intermeddle with the receipt of money, and one trusts the other with money given to perform a charitable use, and he wastes it, and dies insolvent, the surviving executor shall be (*a*) charged therewith; but *secus*, if he had not meddled in the execution, or had not joined in proving the will. *Duke's char. uses* 66.

(*a*) Though purchasers for valuable consideration without notice, are by the express words of the statute exempted from having their purchases impeached, yet the persons selling and disposing of lands, goods, &c. in breach of their trust, and having notice of the charitable use, shall make satisfaction: so shall their heirs and executors, as far as they have assets. *Duke's char. uses* 6.

5. If a rent-charge is granted to a charitable use out of lands, in several counties, the commissioners are to charge this rent by their decree, upon all the lands in every county, according to an equal distribution, having a regard to the yearly value of all the lands charged, and cannot by their decree charge one or two manors with all the rent, and discharge the residue in other counties and places, for that would be decreeing contrary to the intent of the donors. *Duke's char. uses* 65.

6. The town of *A.* was, upon a commission of charitable uses, decreed liable to a charity; and the grantees distrained for the whole

whole on one, who held only part of the lands chargeable: And it was held that the whole town being made chargeable, they might ſue for the whole on any part; but a commiſſion was awarded to apportion each man's ſhare. 1 *Chan. rep.* 91. *vide* 1 *Salk.* 163. where it is held, that all the tertenants of lands liable to a charity need not be made parties to the ſuit.

(E) *What ſhall be a Miſ-employment of a Charity, as by altering it from the Donor's Intentions, not increaſing the Rents as the Price of Things increaſe,* &c.

1. IF one who hath a leaſe of lands charged with a charity, commits waſte, this is ſuch a miſ-employment for which the commiſſioners may decree the leaſe void. *Vide Duke's char. uſes* 155.

2. To keep the profits of land or money given to a charitable uſe in one's hands, whether it be concealed or not; not to pay it when it is due, or convert it to other uſes, is a miſ-employment, for which the commiſſioners may decree ſatisfaction. *ibid.* 116.

3. If money be given for the relief of the poor, and it is paid out to build a conduit, this is a miſ-employment: Adjudged 5 *Car.* 1. *ibid.* 94.

4. Several diſtinct charities were given to a pariſh, *viz.* 12*l. per ann.* for repairing the church, 6*l. per ann.* for mending the highways, and ſo much to the poor; in all 40*l. per ann.* And the truſtees having paid 10*s.* a day to a lecturer, and laid out other parts of it for the ſervice of the pariſh, but not according to the directions of the donor: It was held by Ld. Chan. that if it ſhould be admitted, that pariſhioners might charge and apply parochial charities as they thought fit, it would deſtroy all charities; and therefore ordered, that for what was paid the parſon they ſhould not be allowed a farthing; but that for the other payments they ſhould be allowed the money; being promiſcuouſly paid for ſeveral years before; but that for the future it ſhould be paid according to the terms of the charity. *Paſc.* 1682. *Man* and *Ballet*, 1 *Vern.* 42.

5. A man having deviſed 50*l. per ann.* for a lecturer in polemical or caſuiſtical divinity, ſo as he was a bachelor or doctor in divinity, and fifty years of age, and would read five lectures every term, and would at the end of every term deliver fair copies of the ſame to be kept in the univerſity; and in default of ſuch lecturer, he gave that 50*l. per ann.* to —— *College* in *Oxon*: With the conſent of the heir, application was made to mitigate the rigour of the qualifications, *viz.* That a man aged forty, might be capable, that three lectures may be ſufficient every term, and that if fair copies were delivered once in every year, it may ſuffice: But Ld. Chan. refuſed to intermeddle, though no oppoſition was made, and ſaid, That it was not in the power of the heir to alter the diſpoſition of his anceſtor. *Paſc.* 1682. *Attorney General* on the behalf of *Peter-houſe College* in *Cambridge*, &c. 1 *Vern.* 55.

6. If truſtees under-let the land, and make a leaſe good by law, yet the commiſſioners may make this leaſe void, and order the ſettlement of the land on other truſtees. *Duke's char. uſes* 123.

7. If one give his land, then worth 10*l.* a year, to maintain a preacher, ſchool-maſter, and poor people in *Deal*, and the land after comes to be worth 100*l.* a year, it muſt be all employed to increaſe the ſeveral charities. *The School of Thetford*'s caſe, 8 *Co.* 130. where lands were ſet at an under-value, and had been for a long time ſo enjoyed, the leaſe was ſet aſide, and the tenant decreed to pay the arrears of the rent according to the full value. 2 *Vern.* 414.

8. If in the conſtitutions for founding an hoſpital it was ordained, that no leaſe ſhould be made for above twenty-one years, and the rent not to be raiſed, nor above three years rent taken for a fine, though the tenant of the hoſpital lands is intitled to a beneficial leaſe upon renewal; yet this conſtitution is not to be followed according to the letter; but as times alter, and the price of proviſions increaſes, ſo the rent ought to be raiſed in proportion. *Mich.* 1707. *Watſon* and *Hinſworth Hoſpital*, 2 *Vern.* 596. *vide* 2 *Vern.* 746, S. P.

(F) *Concerning Commiſſioners of charitable Uſes.*

1. COMMISSIONERS may appoint truſtees, and enable a certain number, and their heirs, to demiſe the lands, *&c.* for the beſt advantage of the charity; or that when ſuch a number of them die, the ſurvivors may elect others, and ſo continue the number appointed. *Duke's char. uſes.*

2. If truſtees to a charitable uſe miſbehave themſelves by making leaſes at low fines and ſmall rents, *&c.* the (*a*) commiſſioners may decree them void; they may likewiſe turn them out for any breach of truſt, and appoint others. *ibid.* 124.

(*a*) By the ſtatute of 43 *Eliz.* the commiſſioners have power to inquire of abuſes, of breaches of truſt, of negligence, of miſ-employment, of not employing, of concealing, of defrauding, of miſ-converting, of miſ-government, *&c.* See this ſtatute expounded, 2 *Inſt.* 710.

3. The commiſſioners are not to inquire of the miſ-employment of any charitable uſe in another county, than that wherein the lands given to ſuch uſe do lie. *Duke's char. uſes* 118.

4. If the king erects a free-ſchool, and gives lands to it, and appoints four knights, and the heirs male of each of their bodies, to be governors and viſitors, and that none others ſhall intermeddle but knights; by the ſaving in the ſtatute the commiſſioners are excluded from having any juriſdiction. *ibid.* 125.

5. So

5. So if lands be given to a charitable uſe, and the donor appoints truſtees, and likewiſe viſitors, to ſee the truſt performed; in this caſe the commiſſioners cannot, by virtue of the (*a*) ſtatute, intermeddle. But if the viſitors are truſtees alſo, then the commiſſioners ſhall have juriſdiction. *Duke's char. uſes* 124.

(*a*) The things excepted in the ſtatute, and concerning which the commiſſioners can have no juriſdiction, are thoſe relating to colleges and halls in either of the univerſities of *Cambridge* and *Oxford*, the colleges of *Weſtminſter*, *Eaton* and *Wincheſter*, towns corporate, where there are ſpecial governors, colleges, hoſpitals, or free-ſchools, which have ſpecial viſitors or overſeers appointed to them by the founders; alſo purchaſers for valuable conſideration without notice, &c. are protected by the ſtatute.

CAP. XV.

Commiſſioners for Examining of Witneſſes.

(A) *In what Caſes a Commiſſion will be granted.*
(B) *Concerning the Commiſſioners, and the Execution and Return of the Commiſſion.*

(A) *In what Caſes a Commiſſion will be granted.*

1. IF a man is to perfect his anſwer upon interrogatories, or to be examined for a contempt, although the rule of court be, that he ſhall be examined in four days, or ſtand committed; yet if the party be in the country, he ſhall have a commiſſion to take his examination. *Mich.* 35 *Car.* 2. *Anon.* 1 *Vern.* 187.

2. If certain exhibits of writings, which were given in at a commiſſion for examination of witneſſes, are altered and interlined ſince the commiſſion executed, a new commiſſion will be granted to examine as to this matter; but not as to the merits on new interrogatories. *Hil.* 25 *Car.* 2. *Richardſon* and *Lowther*, 1 *Chan. ca.* 273.

273. Though it was objected, that the party had a commiſſioner preſent, and that he could not know it, but by the diſcovery of his commiſſioner, who ought not to diſcover the examination.

3. But where a witneſs alledged, that he had miſtaken himſelf at a commiſſion, and the commiſſion being returned, he came to *London*, and made oath, that he was ſurprized; upon which a ſpecial commiſſion iſſued to re-examine the witneſſes, which was done accordingly; but this ſpecial commiſſion was ſuppreſſed by the maſter of the rolls, by the advice of the ſix clerks, as contrary to the (*a*) courſe of the court. 1 *chan. ca.* 25.

(*a*) But it is now the practice of the court to obtain an order, on motion and affidavit of ſurprize, to have the witneſſes examined *viva voce* in court, or his depoſitions amended, the witneſs being firſt examined before an examiner; but when he is examined in court, or when his depoſitions are read, the order for that purpoſe muſt be produced in court.

4. If after publication any new matter ariſes upon debate, or hearing the cauſe, which may be thought material by the court, a new commiſſion may be granted. 2 *chan. ca.* 75.

5. A general affidavit of having material witneſſes beyond ſea ſhall not be ſufficient for a new commiſſion; but the witneſſes muſt be named in the affidavit, and the point mentioned to which they can materially depoſe. 1 *Vern.* 334.

(B) *Concerning the Commiſſioners, and the Execution and Return of the Commiſſion.*

1. IF the commiſſioners miſbehave themſelves, the court may grant an attachment againſt them; but regularly a commiſſion cannot be ſuppreſſed, but upon a reference and certificate of irregularity. *Cary* 43.

2. If a commiſſioner in a cauſe be himſelf to be examined as a witneſs, he muſt be firſt examined; and if others be before him examined in his preſence, he cannot afterwards be examined, having heard the former examinations; and for that cauſe a commiſſioner was examined in court, his former depoſitions being ſuppreſſed. 2 *chan. ca.* 79.

3. When a commiſſion is returnable *ſine dilatione*, if it be within the kingdom, it muſt be returned by the ſecond return of next term; if executed afterwards, it is void, and the depoſitions ought to be ſuppreſſed: *per cur'*. 2 *Vern.* 197.

CAP.

CAP. XVI.

Common.

(A) *In what Matters relating to a Common will a Court of Equity interpoſe and exert a Power.*

1. IF one commoner, who had recovered 10*l.* damages at law againſt another for oppreſſing the common, (*a*) brings a bill againſt the defendant at law, (*a*) to examine his witneſſes, and prove his right of common *in perpetuam rei memoriam*, ſuch a bill will not be admitted till ſuch commoner has recovered at law in affirmance of his right. *Hil.* 1684. *Pawlet* and *Ingres*, 1 *Vern.* 308.

(*a*) This is not according to the original, for there "the bill is brought by the defendant at law." Had it been by the plaintiff (as here) the bill could not be diſmiſſed on this reaſon, as it is plain he had recovered 10*l.* for the ſurcharge, at law.

2. But if the bill had been, that one commoner had recovered one ſhilling, or other ſmall ſum, for damages againſt the plaintiff for oppreſſing the common, or for uſing the common when he ought not, and therefore that the other commoner may accept of the like damages for what was paſt, to prevent charges at law, that had been in the nature of a bill of peace, and proper in this court. *Ibid.*

3. A man having granted to *J. S.* common in his down for 100 ſheep and five rams, the bill complained, that the grantor over-ſtocked the common; ſo that the plaintiff, the grantee, could have no benefit of the grant, and prayed the grantor might be injoined not to over-ſtock, *&c.* but upon debate the court (*a*) diſmiſſed the bill. *Mich.* 1689. *Fines* and *Cob*, 2 *Vern.* 116.

(*a*) For a commoner may have an action, if the lord, or any other perſon ſurcharges the common. *F. N. B.* 125. 9 *Co.* 112, S. P.

4. If the lord of the manor incloſes part of the common, and ſuggeſts that it is only an improvement within the ſtatute of *Merton*, and the tenants, by force, throw open the incloſures, Chancery will grant an injunction, and direct an iſſue to be tried at law, whether there was ſufficient common left beyond what was incloſed. Decreed *Hil.* 1697. *Arthington* and *Fawkes*, 2 *Vern.* 356. *Ibid.* 301, S. P.

5. There was an agreement for an incloſure, but all that claimed common were not parties to it; and although it was inſiſted upon, that to decree the agreement would be to do a manifeſt wrong;

wrong; yet the court decreed it, and awarded a commiſſion to ſet out each perſon's title, and ſaid, that if any that had intereſt were not parties to the agreement, they could not be bound, and ſo at no prejudice; but however, that it ſhould not be in the power of two or three wilful perſons to oppoſe a public good. *Thirveton* and *Collier*, 16 *Car.* 2. 1 *chan. ca.* 48.

6. So where an agreement was between the lord and ſome of the tenants to ſtint a common, it was decreed, though oppoſed by one or two humourſome tenants. *Trin.* 1689. *Delabeere* and *Beddingfield*, 2 *Vern.* 103. and there ſaid, that an agreement to ſtint was more favoured than an agreement to incloſe.

7. But in a caſe where it was not charged in the bill, that the defendant would be benefited by the incloſure, nor charged that there was any agreement for an incloſure; on a demurrer, for theſe reaſons, the bill to compel the only freeholder in the manor to conſent to an incloſure, was diſmiſſed. 1 *chan. rep.* 259.

8. A common which has been incloſed for thirty years, ſhall not afterwards be thrown open. *Hil.* 1681. *Silway* and *Compton*, 1 *Vern.* 32.

9. So where there was a decree for an incloſure twenty years ſince, to which the huſband agreed; but the wife having an eſtate within the manor, and her huſband's agreement not in ſtrictneſs binding her, ſhe would now diſturb the incloſure; but it being proved that ſhe was benefited by the incloſure, the court decreed that it ſhould ſtand. *Paſc.* 1687. *Rothwell* and *Widdrington*, 1 *Vern.* 456.

10. If the lord of the manor enfranchiſes a copyhold, with all commons thereunto belonging or appertaining, and afterwards buys in all the other copyholds, and then diſputes the right of common with the copyholders he had enfranchiſed, and recovers at law; though the common be (*a*) extinct at law, yet it ſhall ſubſiſt in equity, and the ſame right of common as belonged to the copyhold will be decreed. *Hil.* 1691. *Styant* and *Stuker*, 2 *Vern.* 259.

(*a*) Where the lord's enfranchiſing a copyhold, with all common thereunto belonging, is an extinguiſhment at law. *Vide* 2 *Cro.* 253. *Yelv.* 189. *Moor* 667. 1 *Brownl.* 173, 230. and where a releaſe of common in one acre is an extinguiſhment of the whole common, or where the unity of poſſeſſion of the whole land makes an extinguiſhment, *vide* 4 *Rep.* 37. 1 *Inſt.* 122. 8 *Rep.* 136.

CAP.

CAP. XVII.

Conditions and Limitations.

(A) *Who are to take Advantage of a Condition, or will be prejudiced by it.*

(B) *In what Caſes the Breach of a Condition, or the Non-performing of a Condition precedent or ſubſequent, will be relieved againſt, the Matter reſting in Compenſation.*

(C) *In what Caſes a Gift or Deviſe, upon Condition not to marry without Conſent, ſhall be good and binding or void, being only* in Terrorem.

(A) *Who are to take Advantage of a Condition, or will be prejudiced by it.*

1. IF by a ſettlement lands are limited to the ſecond ſon in fee, provided that if the eldeſt ſon die without iſſue, the ſecond ſon ſhall, within ſix months after the death of the eldeſt ſon, pay 1500*l.* to a ſiſter; or in default thereof the land to go to the ſiſter and her heirs; and the eldeſt ſon dies without iſſue, and the ſiſter dies within the ſix months; upon the ſecond ſon's refuſing to pay the money, the land ſhall go to the heir, and not to the executor of the ſiſter; for to decree otherwiſe, would be to deſtroy the known (*a*) difference between a condition and a limitation, Decreed with the aſſiſtance of the two chief juſtices, *Trin.* 1686. *The Earl of Winchelſea* and *Wentworth*, 1 *Vern.* 402, 430, S. C.

(*a*) Words which create a condition are, *upon condition, ſo that, to the intent, to pay, to the effect*, &c. *Co. Lit.* 204. *Hard.* 10, 11. But as to words which make a condition in a will, tho' not in a deed, *vide* 10 *Co.* 40, 41. and there it is held, that if there be expreſs words of condition annexed to the eſtate, it cannot be conſtrued a limitation, as the words *quamdiu, dummodo, dum, quouſque, durante*, &c. But this opinion is now exploded; for though words which properly create a condition be uſed; yet, if the eſtate be limited over, it ſhall be a limitation. 2 *Brownl.* 65, 66. 1 *Rol. Abr.* 412. 1 *Mod.* 86. And *per Hale* C. B. There is no other caſe to warrant the contrary opinion, but that of 10 *Co.* 40. and by him it may properly be called a conditional limitation, 1 *Vent.* 199. of which the heir cannot take advantage, though it may determine the party's eſtate without entry or claim, which ſeems to be the chief difference between a condition and limitation. Alſo if lands are deviſed to the heir at law, upon condition that he pay a ſum of money, or do any other act; this on failure of performance ſhall be conſtrued a limitation, though not mentioned; for if it were a condition, no body could take advantage of it, the benefit of conditions annexed to the real eſtates belonging to the heir, as thoſe to the perſonal do to the executor. *Cro. Eliz.* 204. 3 *Co.* 32. *Owen* 112. 2 *Mod.* 7. 1 *Lutw.* 809.

2. A man ſeiſed in fee deviſed lands to his daughter and her heirs, and his mind is, that if his ſon pay to her 50*l.* then his ſon ſhall have the land; the money was not paid at the day; the daughter ſold the land; and it was decreed againſt the vendee, the ſon paying the money; for the court took it to be but in nature of a ſecurity. *Hil.* 30 *Car.* 2. *Bland* and *Middleton*, 2 *Chan. Ca.* 1. But the reporter being of opinion, that the ſon took but an eſtate for life, adds a *Quere*, why a fee-ſimple ſhould be (as it was) decreed him, ſeeing thereby he had more benefit by the not performing the condition, than if he had performed it.

3. A man deviſed lands called *S.* to his younger ſon, and declared that if he ſhould any way be hindered from enjoying them, then in lieu thereof he ſhould have all the land at *B.* A moiety of the lands called *S.* were evicted from the deviſee, who thereupon inſiſted to have the whole lands at *B.* but the court decreed that he ſhould have as much of the lands only at *B.* as were equal in value to thoſe evicted. *Mich.* 1684. *Tyle* and *Tyle*, 1 *Vern.* 270.

4. If legacies are given by will to four grandchildren, upon condition, that as they come of age they ſhall releaſe all claims to the teſtator's eſtate, this condition muſt be taken *diſtributively*, and ſuch only as refuſe to releaſe ſhall forfeit their legacies. *Per* Ld. K. 2 *Vern.* 478.

5. A man having iſſue a ſon by the firſt venter, and two ſons and ſix daughters by a ſecond wife, ſettles his eſtate in queſtion on his eldeſt ſon by his ſecond wife in tail male, remainder to his ſecond ſon by his ſecond wife, and the heirs male of his body; and in default of ſuch iſſue to the ſon by the firſt wife; provided, if both his ſons by the ſecond wife died without iſſue male, ſo that the eſtate came to the eldeſt ſon; that then his eldeſt ſon, or his heirs ſhould, within four months after the eſtate came to him, or them, pay 1000*l.* to his daughters; or in default, the truſtees therein named to enter and raiſe it: the ſon by the ſecond wife entered, and ſuffered a recovery of one moiety of the lands, and died without iſſue, and the other ſon by the ſecond wife died alſo, by which one moiety of the land came to the heir of the eldeſt ſon by the firſt wife; and the moiety thus deſcended was decreed liable to the whole ſum of 1000*l.* although it was objected, that the eſtate never came to the eldeſt ſon; and though a moiety came to his heirs, yet as ſo great a benefit did not accrue to him as was intended, he ſhould be only anſwerable in proportion. *Mich.* 1698. *Hoodley* and *Booth*, 2 *Vern.* 359.

Lucas's rep. 420. *Stra.* 129. S. C. 3 *Bac. Abr.* 21. S. C. 1 *Bac. Abr.* 422. S. C. 10 *Mod.* 419 S. C. 2 *Com. Dig.* 330. (G) *Fearne cont. Rem.* 303. 317. 1 *Atk.* 394. S C.

6. *J. S.* having iſſue three ſons, *William* his eldeſt, *Nathaniel* his ſecond, and *Daniel* his third; *William* died in the life-time of his father, leaving iſſue only a daughter; afterwards the father deviſes the eſtate in queſtion to *Anne* his wife for her life, and after her death to his ſon *Daniel* and his heirs; provided that if *Nathaniel* do, within three months after the death of my wife, pay to *Daniel* his executors or adminiſtrators, the ſum of 500*l.* then the ſaid lands ſhall come to my ſon *Nathaniel*, and his heirs; the wife lived ſeveral years after, and during her life *Nathaniel* died, leaving the plaintiff his heir, and the wife afterwards dying, the plaintiff brought this bill within three months after her death, praying, that upon payment of the 500*l.* he might have a conveyance of the eſtate; and the principal point in the caſe was, whether this

500*l.*

500*l.* being to be paid by *Nathaniel* within a limited time, and he dying before that time came, whether his heir at law could now, on payment of the money, make a title to these lands; for it was agreed that he was not heir at law to the testator; and it was insisted upon that he could not; that this was a condition precedent, and merely personal in *Nathaniel*, who had neither *Jus in re*, nor *ad rem*, and could neither have devised or released, or extinguished this condition; and being a bare possibility, and he dying before it was performed, his heir could not make it good; and tho' the word *heirs* be used in the devise to *Nathaniel*, yet that is not designed to give them any estate originally, but to denote the quantity of the estate which *Nathaniel* was to take; and for this were cited *Lampet*'s case, 10 *Co.* and *Bret* and *Ringden*'s, *Plow. Com.* On the other side it was insisted, that this was like the common case, *Co. Lit.* 205, 219. *b.* where a feoffment is made on condition that the feoffor shall, before such a day, *&c.* there, if the feoffor die before the day, his heir may perform the condition, for the reasons there mentioned; and that it being so at law, it should still be construed more liberally in equity, where the letter of a condition is not always required to be strictly performed; and for this was cited 1 *Chan ca.* 89. *Bertie* and *Falkland*, 3 *Chan. ca.* That the possibility of performing this condition was an interest or right, or *Scintilla Juris*, which vested in *Nathaniel* himself; that he survived the testator; and therefore this differed from *Bret* and *Rigden*'s case, *Plow. Co.* 110. that consequently such right, possibility or interest, descended to his heir, and might be performed by him; as before the statute *de donis*, the possibility of reverter descended to the heir of the donor; and for this were cited *Pursoy* versus *Rogers*, 2 *Saund.* *Cro. Car.* 358. *Cro. Jac.* 591. 8 *Co. Matthew Manning*'s Case, and others. The cause being first heard by the master of the rolls, was thought by him a matter of great difficulty, and therefore he appointed the counsel to speak to it when the court was full. Afterwards it was decreed by Ld. Chan. with the assistance of the master of the rolls, for the plaintiff, on *Litt. Sect.* 334, 335. and Ld. Chan. said that tho' a condition, in strictness of law, was not devisable, yet since the statute of uses (*a*) the devisee may take benefit of it by an equitable construction, *&c.* and that *Nathaniel* might have released or extinguished this condition. *Mich.* 5 *G.* 1. *Marks & Marks.*

10 Co. 466. b. Plowd. 340.

(*a*) Since the statute of Wills and statute of uses executory devises and springing uses have been allowed of: these were first allowed of with respect to the testator or party himself; afterwards it came to be allowed of to other persons; and therefore at this day in devises and limitations of uses, an estate may be limited over to a third person upon the defeasance of a former estate in fee, if the condition be not too remote in point of time; and tho' there have been words found out to save in appearance the maxims of the common law, yet in effect and in truth the very benefit and advantage of the condition is passed over to a third person, notwithstanding the maxim of law, that a stranger cannot take advantage of a condition. *per Parker* C. in S. C. *Lucas's Rep* 423.

(B) *In what Cases the Breach of a Condition, or the not performing a Condition precedent or subsequent, will be relieved against, the Matter resting in Compensation.*

1. IF *A.* conveys lands to *B. &c.* and their heirs, upon trust, that if *C.* the son of *A.* within six months after the death of *A.* should secure to trustees 500*l.* for the younger children of *C.* then after such security given, to convey to *C.* and his heirs, and until the time for giving such security, in trust for the eldest son of *C.* and in default of such security to convey to such eldest son and

and his heirs, if *C.* dies before any ſuch ſecurity given; yet this condition (*a*) precedent being only in nature of a penalty, the intent of the truſt ſhall be regarded, which was to ſecure 500*l.* to the younger children. *Trin.* 19 *Car.* 2. *Wallis* and *Crimes*, 1 *Chan. ca.* 89. 1 *Mod.* 307, S. C. cited.

(*a*) Conditions precedent are ſuch as are annexed to eſtates, and muſt at law be punctually performed before the eſtate can veſt. A condition ſubſequent is, when the eſtate is executed; but the continuance of ſuch eſtate dependeth on the breach or performance of the condition: though this diſtinction is often mentioned in courts of equity, yet the prevailing diſtinction is to relieve againſt conditions, where compenſation can be made, whether they be precedent or ſubſequent, as appears by this and ſeveral other caſes.

2. The teſtator deviſed his eſtate to the defendants in truſt, for the uſe and benefit of the plaintiff, but declared his will to be, that the plaintiff ſhould have no benefit of the deviſe, unleſs the plaintiff's father ſhould ſettle on the plaintiff two full thirds of the eſtate ſettled on the father on his marriage; and in default thereof the eſtate to the defendants; the father made no ſettlement on the plaintiff, but deviſed all his eſtate to him for life, but ſubject to the payment of debts; it was admitted, and ſo adjudged by the court, that this eſtate was executed in the plaintiff by the ſtatute of uſes, and conſequently that this is a condition ſubſequent; yet the court declared, that though conditions ſubſequent, which are to deveſt an eſtate, need not be literally performed; yet even in ſuch caſe, if the party cannot be compenſated in damages, it would be againſt conſcience to relieve; and therefore ordered the maſter to examine the value of the eſtate deviſed, and the amount of the debts which that eſtate was charged with, and to report to the court, whether, after debts paid, there would be two full thirds of the father's eſtate, which was ſettled on him in marriage, left to the plaintiff; and upon a rehearing would not vary the former order, declaring that the difference was, whether this caſe lay in compenſation or not; and if a compenſation was made, he would relieve againſt the breach of the condition; but in caſe a ſufficient compenſation was not made, he would then conſider farther of it. *Paſc.* 1683. *Popham* and *Bampfield*, 1 *Vern.* 79, 167, S. C. 2 *Vern.* 222, S. C. cited as a caſe in which there was relief; 2 *Vern.* 338, S. C. cited as a condition which was relieved againſt.

3. If a feme covert, having power by will to deviſe lands, deviſes them to her executors to pay 500*l.* out of them to her ſon; provided that if the father gives not a ſufficient releaſe of certain goods to her executors, that then the deviſe of the 500*l.* ſhould be void, and go to the executors; and after her death a releaſe is tendered to the father, and he refuſes; yet upon making the releaſe afterwards, the money ſhall be paid to the ſon; for it was ſaid to be the ſtanding rule of the court, that a forfeiture ſhould not bind where a thing may be done after, or a compenſation made for it, as where the condition is to pay money, *&c.* and though it is generally binding where there is a deviſe over, yet here it being to go to the executors, it is no more than the law implies. *Cage* and *Ruſſel*, 2 *Vent.* 352.

4. If a man deviſes lands to *J. S.* upon condition to pay 20,000*l.* to his heir at law, *viz.* 1000*l. per ann.* for the firſt ſixteen years, and 2000*l. per ann.* after, till the whole ſhould be paid, and the heir enters for the non-payment of one of the 1000*l. per ann.* *J. S.* ſhall be relieved upon payment of the 1000*l.* together with intereſt

teſt from the time it became payable, without any deduction for taxes, the court declaring, that wherever they can give ſatisfaction or compenſation for the breach of a condition, they can relieve. *Mich.* 6 *Ann. Grunſton* and *Lord Bruce*, 1 *Salk.* 156. 2 *Vern.* 594. *Mich.* 1707. S. C. 1 *Bac. Abr.* 407.

5. If one having three daughters, deviſes lands to his eldeſt upon condition that ſhe, within ſix months after his death, pay certain ſums to her two other ſiſters; and if ſhe failed, then he deviſed the land to his ſecond daughter on the like condition, *&c.* the court may inlarge the time for payment, though the premiſes are deviſed over; and in all caſes that lie in compenſation, the court may diſpenſe with the time, though even in caſe of a condition precedent. *Paſch.* 1691. *Woodman* and *Blake*, 2 *Vern.* 222. Note; *The following caſe, which ſeems to be between the ſame parties, is otherwiſe ſtated.*

6. One ſeiſed in fee of lands of 10,000*l.* value, ſettles it ſo, that in caſe his eldeſt daughter, within ſix months after his death, ſhould pay 6000*l.* to the uſe of his other four daughters, then the eldeſt to have the land; but if ſhe failed in payment, then the ſecond to have the like privilege; the ſix months paſſed without payment; and the eldeſt daughter having aſſigned over her intereſt to one to whom ſhe was indebted, by which the eſtate was to go out of the family, contrary to the intention of the donor; the court took time to conſider, whether they could retrieve in this caſe, or not. *Woodman* and *Blake*, 2 *Vern.* 166.

7. If the father makes a voluntary ſettlement on his eldeſt ſon in tail male, remainder to a ſecond ſon, *&c.* in which is a proviſo, that if the eldeſt did not pay the ſecond 600*l.* at his age of twenty-one years, that then the eſtate of the eldeſt ſhould in law and equity ceaſe; and the father afterwards marries a ſecond wife, and by deed, taking notice of the former ſettlement, and that the ſon had not paid the money, conveys the ſame lands to the uſe of his children by his laſt wife; the eldeſt ſon ſhall not be relieved, the conveyance being partly voluntary, and the condition ſpecial, that his eſtate ſhould ceaſe in law and equity. *Paſch.* 1687. *Longdale* and *Longdale*, 1 *Vern.* 456. and the ſon's bill diſmiſſed accordingly; and the rather, for that the ſon had ſet up a leaſe againſt his father, which was obtained by ſurprize; and the deed in law was defective, and amounted only to a declaration of truſt.

8. But where one deviſed his lands to *J. S.* his kinſman, paying a thouſand pounds a-piece to his two daughters, who were his heirs at law, and *J. S.* made default, and the daughters recovered in ejectment; yet *J. S.* was relieved on payment of principal, intereſt and coſts; tho' it was inſiſted, that this was to the diſinheriſon of the heir, and in favour of a voluntary deviſee. *Mich.* 1699. *Barnardiſton* and *Fane*, 2 *Vern.* 366.

9. A man deviſed to each of his daughters 20,000*l.* payable at the age of twenty-five years; but if they or either of them, married before the age of ſixteen, or if the marriage were without the conſent of their mother and truſtees, then they ſhould loſe 10,000*l.* of the portion, which ſhould go to his other children; one of them married before the age of ſixteen, and though it was with the conſent of all the parties, yet Ld. K. held, that both the terms of the condition ought to have been obſerved. *Lord Saliſbury*'s caſe,

2 *Vent.*

2 *Vent.* 365. but *vide* 2 *Vern.* 223, S. C. reported, where it is ſaid, that the father treated with the lord *Saliſbury* about the marriage, tho' he died before it was had; and there the decree is quite contrary; and with this laſt reſolution agrees *Skin. rep.* 285, S. C.

Mem. in Vern. it was on a rehearing, when ld. keeper's decree (that in Vent) was reverſed, and ſo no inconſiſtency in the books. The firſt 36 Car. 11. & the reverſal term. paſch. 1691.

10. *A.* deviſed his lands to truſtees for three years, and if within the three years there happened a marriage between *G.* who was a diſtant relation and of the ſame blood, and *W.* his niece and heir at law, then to *W.* for life, remainder to her firſt ſon, *&c.* in tail male by *G.* to be begotten: but if the marriage ſhould not take effect within the three years, or if the marriage ſhould be before the years of conſent, and not ratified when of competent age, then to *F.* in tail, who was likewiſe a remote relation of the teſtator, but not of the ſame blood. The marriage between *G.* and *W.* did not take effect within the three years, though ſeveral propoſals were within the time made by her friends to his guardians, but not accepted by them; and though ſhe herſelf had preſſed the match as far as the modeſty of her ſex would permit. She afterwards married the plaintiff, and by her bill prayed the benefit of the deviſe, the condition being anſwered by her to what ſhe was capable of doing, having married a perſon, as was urged, equal in circumſtances, *&c.* to *G.* but her bill was diſmiſſed by the advice of *Holt* and *Treby* ch. juſtices, *Hil.* 9 *W.* 3. *Bertie* and *lord Faulkland*, 3 *Chan. ca.* 129. 1 *Salk.* 231, S. C. where it is ſaid that the decree was reverſed in the houſe of lords. 2 *Vern.* 333, S. C. where it is ſaid, that the matter was ended there by compromiſe.

12 Mod. 182. Holt. 230. 2 Freem. 220.

Ca. in B. R. Temp. *W.* 3. 182, S.C. ſays appeal was had to the Lords, where no determination; but endend by compromiſe. The lords reverſed the decree and did give judgment. v. Colles's caſ. par. 10. and it ſeems the lords conſidered the words of the deviſe as having given an eſtate for life to the niece and inheritance in tail male to Lord Faulkland.

vide for this head 3 Bac. abr. 479, 480, 1.

(C) *In what Caſes a Gift or Deviſe, upon Condition not to marry without Conſent, ſhall be good and binding, or void, being only* in Terrorem.

This agrees with the regiſter book, *per* ſir *J. Jekyll* maſter of the rolls, in the caſe of *Hervey* and *Aſhton*, *Mich.* 1736. *Eq. ca. Temp. Talbot* 215.

1. IF there be a portion of 8000*l.* given to a woman, provided ſhe marries not without the conſent of *A.* and that, if ſhe marries without his conſent, ſhe ſhall have but 100*l. per ann.* yet if ſhe marries without his conſent ſhe ſhall be relieved, for the proviſo is *in Terrorem* only. *Trin.* 15 *Car.* 2. *Sir Henry Bellaſis and his wife* and *Sir Will. Ermin*, 1 *Chan. ca.* 22. 2 *Chan. rep.* 22, S. P. 1 *Vern.* 20, S. P. *per* Ld. Chan. *Nel. Chan. rep.* 145, S. P. decreed; 2 *Vern.* 293, S. P.

2. But it was ſaid, that if the portion upon ſuch marriage had been limited over to another, it had been (*a*) otherwiſe. 1 *Chan. ca.* 22. 2 *Chan. rep.* 95, S. P. decreed; 2 *Vern.* 357, S. P. decreed, and the diſtinction taken *ut ſupra.*

(*a*) A deviſe upon condition not to marry at all, or not to marry a perſon of ſuch a profeſſion or calling, is void by our law, whether there be a limitation over or not; but if it were upon condition not to marry a papiſt, or a certain perſon by name, it may be good. 1 *Vern.* 20. But by the civil law a gift or deviſe upon condition not to marry without conſent is void, though there be a limitation over: for the maxim there is *Matrimonium debet eſſe liberum: Per Hale* C. J.

3. If by leaſe 9000*l.* is ſecured for a feme ſole, in caſe ſhe marries not contrary to the liking of *A.* and if ſhe doth, then for ſuch perſon as *A.* ſhall nominate; and for want of ſuch nomination, for *A.* and ſhe marries without the conſent of *A.* yet he cannot

not diſpoſe of the leaſe otherwiſe than for her benefit. *Mich.* 16 *Car.* 2. *Fleming* and *Waldgrave*, 1 *chan. ca.* 58. 2 *Vern.* 573, S. C. cited, where it is ſaid, that there may be a difference between a condition that ſhe ſhall not marry without conſent, and where it is that ſhe ſhall not marry againſt conſent.

4. If *A.* deviſes a meſſuage, *&c.* to *B.* his wife for life, remainder to *C.* his grandaughter in tail, upon condition that *C.* marries with the conſent of his wife, and *D.* and *E.* or the major part of them; and if ſhe marries without their conſent, or dies without iſſue, deviſes the ſame to *F.* and her heirs; and after *C.* ſteals away, and is married without the conſent of any of them; and all of them, as ſoon as they heard of it, proteſt againſt the marriage, but afterwards conſent to it, and then *B.* dies, and *D.* and *E.* ſwear that they do not know, but that if their conſents had been aſked before, there might have been ſuch reaſons given, that they might have aſſented; yet *C.* ſhall not be relieved in equity, for the ſubſequent aſſent cannot deveſt the eſtate which was before veſted in *F.* And there ſhall be no collateral averment, that it was intended only *in terrorem*. *Fry* and *Porter*, 1 *chan. ca.* 138. Upon the firſt hearing a decretal order was made by the maſter of the rolls, that ſhe ſhould be relieved, but upon a re-hearing by Ld. K. aſſiſted by the three chiefs, her bill was by their unanimous opinion diſmiſſed. 1 *Mod.* 300, S. C. 2 *chan. rep.* 26, S. C. 1 Vent. 199, S. C.

5. *A.* by will gives his grandaughter 200*l.* on condition ſhe continued with his executors till ſhe was twenty-one; but if ſhe was taken from them by her father, (who was a papiſt) or married againſt the conſent of his executors, then he gave her but 10*l.* The daughter was placed by the executors with a clergyman, who, before ſhe was twenty-one, with conſent of one of the executors, permitted her to make a viſit to her father; and he took that opportunity to marry her to a papiſt, and ſhe was decreed the legacy at the rolls; but upon a re-hearing Ld. K. held, that ſhe ſhould have but the 10*l.* only; and he ſaid, That in this caſe there was no difference between a condition that ſhe ſhall not marry without conſent, and that ſhe ſhall not marry againſt conſent. *Hil.* 1706. *Creagh* and *Wilſon*, 2 *Vern.* 572. Quære, *Whether there was any limitation over?* It ſeems not, and there was none required, as the Ld. Keeper took the condition to be a precedent one.

6. Lands were ſettled in truſt for raiſing portions for daughters, payable upon their marriages, with the conſent of truſtees; but if they married without ſuch conſent, then to remain over to another, &c. The daughters were old, and never intended to marry, but to lay out their portions in a purchaſe of annuities for their lives; and it was held that they ſhould have their portions immediately, upon giving ſecurity to indemnify againſt the perſons to whom the portions were deviſed over. Decreed 25 *Car.* 2. *Needham* and *Vernon*, *Rep. Temp. Finch* 62. 2 *Vern.* 452, S. P. decreed upon giving ſecurity to refund, if the condition ſhould be broken, though no mention made that the daughters did not intend to marry.

7. *A.* deviſed 300*l.* to *B.* her daughter, and that if ſhe married under twenty-one, without conſent of the executors or major part of them, the legacy to go to the children of her ſiſter, the wife of *D.* and made *C.* and two others executors; *B.* being at the houſe of *C.* there marries his ſon by a former wife with his privity, being under twenty-one; *B.* and her huſband bring a bill for the legacy,

C.

C. in favour of his other children insists that the legacy is forfeited. The other executors confessed they had notice of the courtship, and did not contradict or disapprove of it; and the 300*l.* was decreed the plaintiffs, there being at least a tacit consent. *Hil.* 1706. *Mesgrett* and *Mesgrett*, 2 *Vern.* 580.

S. C. Post. 412. pl. 13. Vin. abr. tit. *Devise*, ca. 11. p. 154. S. C. 2 Eq. abr. 771. pl. 12.

8. If the father devises lands in trust to permit his daughter to receive the rents until her marriage or death, and in case she marry with the consent of trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. The daughter afterwards marries with the consent of her father, who settles part of the lands on her and her husband, and dies; this settlement shall be no revocation of the will as to the devise of the other lands to her; and by the father's consenting in his life-time, the condition is dispensed with. *Mich.* 1716. *Clerk* and *Berkeley*, 2 *Vern.* 720.

Note, no resolution was taken in this case: but it went off for want of parties, and never came on again. *Per Jekyll* master of the rolls: *vide Eq. ca. Temp. Talbot* 215.

9. A. devised to his daughter *M.* the plaintiff, 100*l.* to be paid by his executors upon her day of marriage, or age of twenty-five years, which should first happen, upon condition that she should marry with the consent of such and such persons; and if she married without their consent, then to have 50*l.* only, and no more; and gave the residue of his personal estate to the defendants. *M.* married the plaintiff, without such consent, before she was twenty-one: And it was held by the master of the rolls, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate, was a devise over of the 50*l.* on *M.*'s disobedience. *Mich.* 1699. *Amos* and *Horner*.

Pre in Chan. 348, 109, 227. *Gilb. Eq. rep.* 26. ch. ca. 22. 58, 158. 2 chan. ca. 1, 23, 95. 1 Vern. 20. 2 Vern. 293, 357, 452, 572, 720. Talb. c, 117. 2 Eq. ab. 656. 3 P. W. 414. 4 Br. P. C. 228.

10. The defendant's father devised to him, who was his heir at law, all his lands, &c. (except such and such parts) charged with the sum of 2500*l.* to his daughter (since married to the plaintiff) at her age of twenty-one years, or marriage, which should first happen, and devised the excepted lands in trust to be sold for the payment of his debts: Provided, that if his said daughter should marry in the life-time of her mother without her consent first had in writing, then 500*l.* part of the said 2500*l.* should cease, and should be applied towards payment of his debts charged on the said excepted lands; and appoints his wife to be guardian of his said daughter, and makes her executrix, and dies: the daughter attains her age of twenty-one years, and without the consent or privity of her mother intermarries with the plaintiff, who was a gentleman of some estate, and called to the bar, but had made no settlement or provision for his wife; and therefore the defendant, the heir at law, refused to raise or pay any part of his sister's portion; and insists likewise, that by her marriage without her mother's consent, 500*l.* part of her fortune, was become forfeited: whereupon the plaintiffs brought their bill to have the whole portion raised by sale of the lands charged therewith. *Per* Ld. K. This is a portion to be raised out of lands, and therefore to be considered as land; and though it be to go towards payment of debts on breach of the condition, and there appear one hundred and twenty creditors concerned, yet none that are in danger of losing their debts; and it is then to be considered as it stands upon the condition itself; and therefore the plaintiff must have her whole portion; for the testator has appointed two periods of time to intitle her to it, *viz.* marriage

marriage, or the age of twenty-one: And as she has attained that age, it becomes a vested and settled interest in her, not to be devested by the marriage without the consent of the mother; for that consent cannot in any reason be carried farther than during her minority. *Hil.* 1712. *King* and *Withers.*

CAP. XVIII.

Contribution and Average.

(A) *Contribution and Average, in what Cases.*
(B) *In what Proportion.*

(A) *Contribution and Average, in what Cases.*

1. IF a man grants a rent-charge out of all his lands, and afterwards selleth them by parcels to divers persons, and the grantee of the rent-charge will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in equity by a contribution from the rest of the purchasers. *Cary* 3.

2. One executor, who pays debts and legacies, may compel the other to contribute. *Toth.* 89.

3. If the collector of fifteenths levies all the tax within one township upon one inhabitant, he shall have the aid of the court of exchequer to make the others contributary. *Lane* 65.

4. If tenant in fee mortgages his estate, or charges it with a sum of money, and after devises it to one for life, remainder to another in fee, equity will compel the tenant for life to bear his proportion of the mortgage or charge, that all may not fall on the remainder-man. Decreed *Hil.* 25 *Car. Hays* and *Hays*, 1 *Chan. Ca.* 223.

Tenant for Life, $\frac{1}{3}$. Remainder-man, $\frac{2}{3}$.

5. So if it be a rent-charge, equity will make the tenant for life pay the arrears. 1 *Chan. Ca.* 223. *per cur'.*

6. *A.* on his marriage agrees to ſettle lands for the benefit of his wife, and their iſſue, and afterwards aliens part of thoſe lands; and Lord *Nottingham* decreed, that the jointreſs ſhould have the deficiency of her jointure made good out of the inheritance of the lands remaining unſold: But that decree was reverſed by *Jefferies* L. C. who held, that where the jointreſs and iſſue claim by the ſame ſettlement, they ſhall contribute proportionably in the diſcharge of any prior incumbrance on the eſtate. *Hil.* 1686. *Carpenter* and *Carpenter*, 1 *Vern.* 440.

1 *Will. Rep.* 403. by the Name of *Long* and *Short.*

7. If *A.* deviſes his real eſtate to his ſon for life, remainder to his firſt ſon, *&c.* in tail, with remainders over, and deviſes ſpecifically a leaſehold eſtate to his daughter, and dies, not leaving aſſets to pay his debts, which affected as well his real as perſonal eſtate, the ſon and daughter ſhall contribute in proportion in paying the debts, each eſtate being liable at law, and the teſtator's intention equal between them both. Decreed *Hil.* 1717. *Short* and *Long*, 2 *Vern.* 756.

8. If a man who is a widower, ſettles lands to raiſe 100*l.* a year for his eldeſt ſon, and 100*l.* apiece for his younger children; and afterwards he marries again, and has children by his ſecond wife; the children by the ſecond wife ſhall be equally intitled with the other younger children; and though the portions of the younger children are by the ſettlement to be paid according to their ſeniority; yet, in caſe of a deficiency, they ſhall be paid in average: Decreed *Mich.* 1 *Jac.* 2. *Brathwait* and *Brathwait*, 1 *Vern.* 334.

1 *Chan. Rep.* 34, S. P.

9. One ſurety may compel another in equity to contribute towards payment of a debt for which they were jointly bound. *Toth.* 41.

10. If three are bound as ſureties in recognizance, and one of the ſureties is ſued at law, and the other ſurety, together with the principal, happens to be inſolvent, he who is ſued may compel the other ſurety to contribute a moiety. 1 *Chan. Ca.* 246. 1 *Chan. Rep.* 120, S. P. *ibid.* 150, S. P.

(a) Though Co-obligors are intitled to a contribution, yet *quære* whether it is neceſſary for the obligee to make them all parties.

11. If you ſue in chancery the executor of one obligor to diſcover aſſets, you muſt make all the obligors *(a)* parties, that the charge may be equal. 2 *Vent.* 348. But a *quære* is put, *Whether you may not ſue the principal, and leave out them which are bound only as ſureties.*

12. But it is held clearly, that if a judgment be had at law againſt one obligor, you may ſue the executor of him alone to diſcover aſſets, becauſe the bond is drowned in the judgment. 2 *Vent.* 348.

13. The plaintiff being one of the owners of a ſhip, loaded on board her 210 tons of oil, and the defendant loaded on board her 80 bales of ſilk, upon a freight, by contract, both to be delivered at *London*; the ſhip was purſued by enemies, and forced into a harbour, *&c.* and the maſter ordered the ſilk on ſhore, being the moſt valuable commodity (though they lay under the oils, and took up a great deal of time to get at them.) The ſhip and oils were afterwards taken, and the owner of the oils brought his bill

to

have contribution from the owner of the ſilk; and although it s admitted that, if goods were thrown overboard in ſtreſs of ather, or in danger or juſt fear of enemies, in order to ſave the p and the reſt of the cargo, that which is ſaved ſhall contribute reparation of that which is loſt; and the owners of the ſhip ll be contributors in proportion; but in this caſe the loſs of the did not ſave the ſilk, neither did the ſaving the ſilks loſe the : And the bill was diſmiſſed accordingly; which diſmiſſion confirmed in the Houſe of Lords. *Show. P. C.* 18, 19.

4. If one makes a leaſe, and the leſſee covenants to pay the , and to repair the premiſſes, *&c.* and the leſſee makes 100 er-leſſees, and the rent is behind, and the premiſſes out of ir, and the original leaſe is avoided for non-payment of rent; ſome of the under-leſſees bring a bill to be relieved againſt forfeiture; though equity will not apportion the head land- 's rent; but the under-leſſees, who are plaintiffs, muſt pay whole rent in arrear, and repair all the houſes; yet they may pel the other under-leſſees to contribute in proportion. *Trin.* . *Webber* and *Smith*, 2 *Vern.* 103.

15. A man deviſed a rent-charge of 10 *l. per ann.* to *A.* iſſu- out of *Black Acre*, with a clauſe, that if it ſhould be behind, ould be lawful for him to enter, and hold till he was ſatisfi- and by the ſame will deviſed a like rent-charge of 10 *l. per* to *B.* iſſuable out of the ſame land, with like clauſe of , *&c.* the land was not of ſufficient value to anſwer both ents; and they were both in arrear, and both deviſees had ht ſeveral ejectments, and had recovered; and the defen- being in poſſeſſion, the other grantee brought his bill to an account of the profits, and that one moeity might be d to ſatisfy the arrears of his 10 *l. per ann.* and it was de- accordingly. *Hil.* 1697. *Eure* and *Eure.*

16. On a marriage-treaty between the defendants, 3000 *l.* the wife's fortune, and 3000 *l.* more added to it by *Willi- ambers*, father of the defendant *John*, were inveſted in lot- nnuities, in the name of truſtees; and thereupon by in- re, 18 *July* 1718. previous to the marriage, reciting that . was ſo inveſted in lottery annuities, it was agreed that ne ſhould be turned into money, and laid out in a purchaſe s to be ſettled to the uſe of the defendant *John* for life, truſtees during his life, to ſupport, *&c.* then to *Elizabeth* ended wife for her life, with remainder to truſtees for two d years, remainder to the firſt and other ſons ſucceſſively male, with remainder to *William Chambers* in fee: And it reby declared, that the two hundred years term was in at in caſe the defendant *John* ſhould have a ſon, and more other children, then the truſtees after the death of nd *Elizabeth*, ſhould by mortgage or ſale raiſe for youn- dren, if more than one, 2000 *l.* between them, and intereſt *er cent. per ann.* for their maintenance; and that till ſuch e, the truſtees, with the conſent of *John* and *Elizabeth*, et the 6000 *l.* continue in annuities, and pay the intereſt perſons as would be intitled to the lands, and the truſtees e anſwerable for more than they received, or for each And by the ſaid indenture *William Chambers* covenanted,

Viner Abridgment, Tit. Contribution and Average. (A) *Caſ.* 60. *S. C. Fitzgib.* 127. *S. C.* 2 *Equ. Abr.* 224. *pl.* 7. *S. C. Moſel.* 333.

in consideration of the said marriage, to settle several lands there in particularly mentioned, to the use of himself for life; then t *John Chambers* in tail male, with remainder to himself in fe The marriage took effect, the 6000 *l.* was not laid out in a pu chase, but in the year 1720, by consent of *John* and *Elizabe* and the trustees, being in lottery annuities, was subscribed in the *South-sea* company, whereby a loss of about 3000 *l.* happe ed. *William Chambers* was dead, having made no settlement the lands specifically agreed to be settled, which therefore w descended to the defendant *John*, his son, in fee; the defe dants had issue the plaintiff, their only son, and four daughte who were likewise defendants: And this bill was brought have the remainder of the 6000 *l.* laid out in a purchase, settled pursuant to the uses before-mentioned; and the question was, on whom the loss of the money subscribed into *South-sea* company should fall; and as to that, it was agr on all hands, that the trustees having subscribed the lottery nuities into the *South-sea* company by consent of the defend *John* and *Elizabeth*, were indemnified therein, not only by terms and covenants in the settlement, but also by the act of liament made in the year 1720, wherein every one's consent involved; and whereby trustees were generally impowere subscribe orders and annuities, *&c.* and therefore it was ar for the defendants, the daughters, that the loss should wholly on the son; that lands were of an uncertain value; if lands had been purchased, and they had afterwards incre never so much in value, by discovering of mines, or other that the plaintiff, the son, would have had the whole b thereof, without any increase to the daughters of their port That in equity an agreement to purchase is considered a purchase were actually made; and there the loss ought t on the plaintiff, and the rather, for that if the stock itse risen never so high, as it was expected it would, and did a very great price, the daughters could only have their s and therefore, as the plaintiff was intitled to all the advan case of a rise, it was reasonable he should bear the loss no a fall had happened; and therefore the daughters ought be contributary to this loss. But on the other side it was and decreed, that the loss should fall in proportion on the d ters, as well as the son; that the parties had an equal re the son, as well as the daughters; that the son was to the name of the family, and was to take first, and more im ately than the daughters, whose portions came afterwards of charge only on the estate; that the construction con for was to overthrow one part of the settlement; and tha loss had been a little more, the daughters must have had the son nothing; that the parties have ascertained the pro each were to have; and this is the measure the court o guide themselves by; and accordingly sent it to a master the account, and to proportion the loss between the *Pasc.* 1730. *Chambers* and *Chambers.*

(B) *In what Proportion.*

1. IF a mortgagee deviſes the mortgaged lands to *A.* for life, remainder to *B.* in fee, and the mortgagor redeems the nds, *A.* ſhall have one third, and *B.* two thirds of the mortgage oney; and this *per* Ld. Chan. is the ordinary rule of the court ſuch caſes. *Mich.* 1682. *Brent* and *Beſt*, 1 *Vern.* 70.

2. So if one deviſes lands which are in mortgage to *A.* for life, emainder to *B.* in fee, and *A.* ſhall contribute one third towards e diſcharge of the mortgage: Decreed *Hil.* 27 & 28. *Car.* 2. *orniſh* and *Mew*, 1 *Chan. Ca.* 271. *Rep. Temp. Finch* 220, S. C.

3. But if lands in mortgage are deviſed to *A.* for life, remainer to *B.* in fee, and *A.* takes an aſſignment of this mortgage in a uſtee's name, though *B.* might have compelled *A.* to contribute e third towards payment of the mortgage, in reſpect of his eſtate r life; yet if *A.* be dead, and the bill is brought againſt his ecutor, he ſhall be obliged to contribute only in proportion e time that *A.* his teſtator, enjoyed it: Decreed *Trin.* 1686. *lyat* and *Battaſon*, 1 *Vern.* 404. *Vid. autem* 2 *Equ. Abr.* 618. *pl.* 2 & 3. (K.) *Prec. Chanc.* 62. *Gilb. Eq. Rep.* 69.

4. *A.* deviſed to *B.* for life, and after, one third part of the reerſion to each of his three ſiſters reſpectively, and their heirs: he ſiſters brought a bill for diſcovery of incumbrances on the ſtate; and to compel the defendant, tenant for life, to bear his are and proportion thereof; alledging that their reverſion ould be of little benefit to them, if the debt were ſuffered to creaſe by nonpayment of intereſt, &c. and charged, that the efendant had cut down timber, for which he ought to be acountable: The court decreed the defendant to pay *two* parts *five* of the debts, and the plaintiffs, the reverſioners, the other maining three *fifths*, and the defendant to account for the timer; and what was raiſed by it to be taken as ſo much in part of hat the reverſioners were to pay. *Paſc.* 1692, *Humphreys* and *ales*, 2 *Vern.* 267.

5. If by a ſettlement two eſtates, the one in *Norfolk*, and the ther in *Suffolk*, are ſubject to the raiſing a portion of 2000 *l.* for daughter, by a term of a hundred years, commencing after the eceaſe of two ſeveral lives; the one upon *Suffolk* eſtate, and the ther on the *Norfolk* eſtate; and the life on the *Suffolk* eſtate falls, nd the daughter brings her bill for the 2000 *l.* and *J. S.* to hom that eſtate was come, pays the 2000 *l.* And afterwards the fe on the *Norfolk* eſtate falls, by which the fee ſimple thereof eſcends on the daughter: *J. S.* who paid the 2000 *l.* ſhall have ontribution out of the *Norfolk* eſtate in proportion to its value, nly the *Suffolk* eſtate ſhall be valued as an eſtate in poſſeſſion, nd the *Norfolk* eſtate as an eſtate in reverſion: Decreed *Hil.* 697. *Hennirgham* and *Henningham*, 2 *Vern.* 355.

CAP. XIX.

Copyhold.

(A) *Concerning the Power of Chancery over Copyhold Eſtates, the Acts of Lords and Tenants, and in what Caſes it has been exerted.*

(B) *In what Caſes a defective Surrender, or the Want of it, will be ſupplied in Equity.*

(A) *Concerning the Power of Chancery over Copyhold Eſtates, the Acts of Lords and Tenants, and in what Caſes it has been exerted.*

1. IF the lord will turn out his copyholder, who payeth his cuſtoms and ſervices, or will not admit him to whoſe uſe ſurrender is made, or will not hold his court for the benefit of copyholder, or will exact arbitrary fines, when they are cuſtomary and certain, the *(a)* copyholder ſhall have a *ſubpœna* to reſtrain or compel him, as the caſe ſhall require. *Cary* 3, 4.

(a) Copyholders were formerly tenants at will of the lord, their lands being parcel of the lord's demeſne; but now thoſe copyholders ſtand on a ſure foundation, if they perform thoſe duties which their tenure requires; for if the lord turns them out, they may either ſue a *ſubpœna* out of Chancery to be relieved, or have an action of treſpaſs againſt the lord; for though they are tenants at will of the lord, yet they are tenants at will according to the cuſtom of the manor, which the lord cannot break without reaſon. *Co. Lit.* 60. *b.* 61. *a.* 4 *Rep.* 21. 9 *Rep.* 79. Preſcription, and that the lands are parcel of the manor, are incident to, and the very pillars on which every copyhold eſtate ſtands. 4 *Rep.* 24. 1 *Inſt.* 58. *b.* Cuſtom is the life and ſoul of copyhold eſtates; for if copyholders break their cuſtom, they are ſubject to the lord's will; the cuſtoms of manors are ſo various, that it is impoſſible to aſcertain them, they muſt, however, be time out of mind; they muſt be reaſonable, according to common right; they muſt be upon good conſideration; they ought to be compulſory, not left to the liberty of the tenant, to obſerve or not obſerve them; they ought to be certain; they ought to be beneficial to the lord or tenant: And if there are not cuſtoms to direct copyhold eſtates, they muſt be directed by the rules of the common law. 1 *Inſt.* 58. *Coke's Comp. Cop.* 33.

2. Equity will oblige the lord to hold a court, *Cro. Jac.* 36 for no action on the caſe will lie againſt him, if he refuſes; and therefore there is no remedy but in Chancery. 2 *Bulſt.* 336.

3.

3. If an erroneous judgment be given in a copyhold court in a Formedon, or the like, a bill may be exhibited in Chancery to reverse it. 1 *Rol. Abr.* 373. A bill may be exhibited, although the king is lord of the manor. *Lane* 98.

4. The court of Chancery has exercised a jurisdiction in rectifying and reversing the judgments given in copyhold courts, whenever they appeared unjust and unreasonable; but for any errors in matters of form, equity will not interpose. *Vide* 1 *Inst.* 60. *Owen* 63. *Moor* 68. 4 *Rep.* 30. 1 *Rol. Abr.* 60.

5. A bill was exhibited to compel the Dean and Chapter of St. *Paul's*, as lords of the manor of ———, to receive a petition in nature of a writ of false judgment, to reverse a common recovery suffered in the manor-court about thirty years before, whereby a remainder in tail was barred, suggesting several errors in the proceedings therein; and though in truth the errors assigned were such as would be gross errors in a freehold estate; yet Lord Chancellor *Jefferies* dismissed the bill. *The Dean and Chapter* and *Lewis Ruggle*, 1 *Vern.* 367. from which decree of dismission there was an appeal to the house of lords, and there the decree was affirmed. *Show. P. C.* For common recoveries, not being adversary suits, but common assurances, equity ought rather to supply defects than to assist in the annulling of them.

6. A copyholder of lands in fee, where, by the custom of the manor, the lord had, as a profit *apprendre*, the cut of the woods and underwoods growing on the copyhold, obtains a grant from the lord of all the woods and underwoods growing, or which hereafter should grow on the said copyhold lands, to him and his heirs; and it was held, that this should not merge in the copyhold, although it was alledged to be only a profit *apprendre*; and though it was urged, that if a copyholder pays a rent to the lord, and the lord grants or releases this rent to his tenant, that this shall merge in the copyhold. *Mich.* 1681. *Fawlkner*, and *Fawlkner*, 1 *Vern.* 21, 22.

7. If *A.* tenant in tail of a copyhold, remainder to himself in fee, purchases the freehold of the lord, and then sells to *J. S.* and dies; and after thirty years possession, the son of *A.* sets up a title as issue in tail, the purchaser should hold against him, the freehold having attracted the other estate, which was at will. *Hil.* 1685. *Parker* and *Turner*, 1 *Vern.* 393.

8. If a copyholder in fee takes an infranchisement of his copyhold in the name of a trustee, and devises the land to his younger son, who sells to *J. S.* and the heir at law recovers in ejectment, as he might do upon his ancestor's admittance, and *J. S.* the vendee brings his bill, he shall be relieved in equity, and hold against the heir: Decreed *Hil.* 1685. *Dancer* and *Evett*, *ibid.* 392.

9. If a copyhold is granted to three successively, and there is no custom proved, that the first taker had power of disposing of the whole, nor that the first taker paid the purchase-money; it shall not go to the executor of the first taker, but shall go in succession. *Pasc.* 1692. *Rundle* and *Rundle*, 2 *Vern.* 264.

10. But if by the custom the first taker may dispose of the whole, and he likewise pays the purchase-money, it shall not be a trust for the other two, but shall go to his executor. 1 *Chan. Ca.* 310.

310. Although it was objected, that the heir or executor cannot be intitled to the truſt of a freehold for life: But *vide* 2 *Vern.* 264 where it is held *per Cur'*, that an executor or adminiſtrator is intitled to the truſt of an eſtate *(a) pur auter vie*, whether freehold or copyhold, or an office; and *vide* the ſtatute 4 & 5 *Ann.*

(a) There can be no occupant of a copyhold eſtate *pur auter vie*, for the prejudice it would do the lord; for upon the death of the tenant the lord ſhall enter immediately. *Per. Holt* C. J. 1 *Salk.* 188.

11. If a copyholder for life, where by the cuſtom there is a widow's eſtate, agrees that *J. S.* ſhould hold and enjoy it during his life and the widowhood of ſuch woman as he ſhould leave at his death, and enters into a bond for that purpoſe; yet the widow ſhall not be bound by that agreement. Decreed *Paſc.* 1688, *Mugrave* and *Daſhwood*, 2 *Vern.* 63.

12. The widow of *Ceſtuy que Truſt* of a copyhold eſtate ought to have her free bench, as well as if the huſband had the legal eſtate in him. 2 *Vern.* 585. *per Cur'*.

13 Copyholds cannot be intailed within the ſtatute *de donis*, but they may by common law, and then ſurrenders or plaints in nature of fines and recoveries may bar them, as well in the court-baron as at common law, if the cuſtom has been ſuch, which is the rule in thoſe caſes. *Cary* 30. That copyholds may by cuſtom be intailed; yet that ſuch intail is not within the ſtatute *de donis*, *vide* 2 *Chan. Ca.* 174. 2 *Vern.* 585. And if there be no particular cuſtom for barring the intail, a ſurrender will do it. *Per Cur'*, 2 *Vern.* 705.

14. Tenants by copy ſhall not pay any uncertain *(b)* fines by change of their lords by alienation, but by death, which is the act of God; for otherwiſe the lord might oppreſs the tenant by frequent alienations. *Cary* 9.

(b) Fines are due by change of the lord or the tenant, by death only and according to cuſtom; for if it were by change of the lord, upon alienation, the copyholder might be oppreſſed by a multitude of fines by the lord's own act. 1 *Inſt.* 59, 60.

15. If the lord inſiſts upon an extravagant fine for a renewal, he ſhall be reſtrained to what is *(c)* reaſonable, although the fine is arbitrary and uncertain; but having demanded ten or twelve years value of the land, the court decreed him only two. 2 *Chan. Rep.* 134 *Rep. Temp. Finch* 154. an arbitrary fine moderated in equity.

(c) If the fine demanded is unreaſonable, the copyholder is not obliged to pay it; and though he himſelf only thinks it unreaſonable, and afterwards it is adjudged reaſonable; yet it is no forfeiture, becauſe it is a matter of controverſy. 1 *Rol. Abr.* 505. 13 *Rep.* 2. It was ſaid by Lord *Hardwicke*, *Eaſter* 12 *Geo.* 2. in the caſe of *Lord Abergavenny* and *Thomas*, That the law has fixed what ſhall be a reaſonable fine for a copyholder in fee to pay; but it has no where fixed what ſhall be a reaſonable fine for a copyholder for life to pay; therefore if a copyholder for life would ſet up a tenant-right of renewal, he muſt ſet forth the fine in certain. *The Duke of Grafton*'s caſe before the lords was cited as ſo adjudged.

16. But where a copyholder in fee made a conditional ſurrender for ſecuring a ſum of money at the end of ſix months; the money not being paid, and the mortgagee willing to continue his money, they deſired the lord that the old ſurrender might be taken up, and a new one made for ſix months longer; but the lord inſiſted on an arbitrary fine of two years value, and that the mortgagee ſhould come in and be admitted; and the court being of opinion, that equity could not relieve againſt the fine, the matter was ended by compromiſe, and a fine of 40 *l.* paid to the lord, the eſtate being 100*l. per ann. Mich.* 1699, *Tredway* and *Fotherby*, 2 *Vern.* 367.

17. If

17. If an infant copyholder is admitted, and the lord committeth the cuſtody of him to his mother, and the infant's tenant commits a forfeiture by cutting down trees, which being preſented and found a forfeiture, the lord enters during the infant's nonage, and the land is held by him and his heirs forty years; yet the copyholder ſhall have relief. *Cary's Rep.* 8.

18. A copyholder for life had committed a forfeiture by cutting of timber-trees, which was found ſuch by a trial and verdict at law, and the lord entered and admitted the defendant, who was the remainder-man; the copyholder exhibited his bill to be relieved againſt the forfeiture, offering, that if it ſhould appear to be waſte, to make ſatisfaction; and an iſſue being directed, to try whether it was the primary intention in cutting the timber to do waſte; and it being found for the plaintiff, it was decreed he ſhould be relieved, and that the defendant, the remainder-man, ſhould deliver poſſeſſion, and account for the meſne profits. *Hil.* 19 *Car.* 2. *Thomas* and *Porter*, 1 *Chan. Ca.* 95.

19. *A.* having two copyholds held of the manor of *B.* cuts timber (pretending a cuſtom for it) on the one, and employs it in repairing the other; the lord brought an ejectment, ſuppoſing this to be a voluntary waſte and a forfeiture; and upon the firſt trial there was a verdict againſt the lord; but upon a new trial there was a verdict againſt the pretended cuſtom; and it being admitted, that by the cuſtom of the manor, when timber was wanting on one copyhold tenement, the lord, by his bailiff, might aſſign timber for repairs on any other of the copyhold eſtates: Ld. K. relieved againſt the forfeiture on payment of the coſt of both the trials at law, and likewiſe of this ſuit. *Hil.* 1705. *Naſh* and *The Earl of Derby*, 2 *Vern.* 537.

20. The plaintiff brought his bill to be relieved againſt a forfeiture of his copyhold eſtate; and the caſe appearing to be, that he had been guilty of the greateſt diſobedience poſſible to his lord; that after ſix ſeveral preſentments upon him to repair it, and an entry by the lord for the forfeiture, he brought an ejectment; and when upon the trial, a rule was entered into by conſent, and made a rule of court, that upon payment of 4 *l.* to the lord for his coſts, (which were not a fourth part of the coſts he had put the lord to) and putting the eſtate into repair, he ſhould be admitted to it again; yet he never complied with the rule, nor made any offer of coſts to the lord; but inſtead of that brought another ejectment, and was nonſuited; and now after nine or ten years time more brings his bill, and had been ſeveral times amerced for not appearing at the court, and refuſed to do fealty, either upon oath, or (being a quaker) upon affirmance; and upon theſe circumſtances Ld. K. declared, he ought to have no relief; or if he were to be relieved, yet it muſt be upon payment to the lord of all his coſts, and putting the eſtate into good repair, which would be more charge to him than his intereſt in the eſtate would be worth, having only an eſtate for life therein, and diſmiſſed the bill, but with coſts; and Ld. K. likewiſe declared, that though this were a voluntary waſte and forfeiture (againſt which it was objected this court never gave relief); yet he thought the rules of equity not ſo ſtrict, but that relief might

even

even be given againſt voluntary waſte and forfeiture. *Mich.* 1710. *Cox* and *Higford*, 2 *Vern.* 664, S. C. *confuſedly ſtated.*

(B) *In what Caſes a defective Surrender, or the want of it will be ſupplied in Equity.*

1. IF a man deviſes a copyhold eſtate to a charity, it ſhall be a good appointment within the ſtatute of charitable uſes, tho there was no ſurrender to the uſe of his will. *Hil.* 25 *Car.* 2 *Rep. Temp. Finch* 75.

2. If *A.* contracts with *B.* for the purchaſe of a copyhold eſtate, and pays the purchaſe-money, and *B.* agrees to ſurrender the premiſſes at the next court, but dies before the next court, or any ſurrender made, equity will ſupply the want of the ſurrender. Decreed *Hil.* 33 *Car.* 2. *Barker* and *Hill*, 2 *Chan. Rep.* 218.

2 *Salk.* 449. Pl. 2. S C. 1 *Will. Rep.* 280. *Prec. in Chan.* 524. *Lucas's Rep.* 492, 4 & 5, S. C. cited.

3. A man ſeiſed of a copyhold eſtate, borrowed 400 *l.* of the plaintiff 1698. and ſurrendered into the hands of two cuſtomary tenants the copyhold in queſtion, to be preſented at any court after *Sept.* 1699. defeaſible on paying the 400 *l.* and intereſt; the mortgagor paid the intereſt for four years together; but no care was taken to get the ſurrender preſented; and in the mean time time the mortgagor became a bankrupt, and died inteſtate and inſolvent. After his death the ſurrender was tendered, but the homage refuſed to preſent it; becauſe by the cuſtom of the manor confirmed by Act of Parliament, all ſurrenders were to be void, if not preſented in *twelve* months after they were made; and Ld. Chan. (tho' he at firſt doubted) decreed, that the ſurrender ſhould be ſupplied againſt the aſſignees. *Mich.* 1706. *Taylor* and *Wheeler*, 2 *Vern.* 565.

4. So in a caſe where *A.* lent *B.* 200 *l.* on a ſurrender of ſome copyhold lands, which *A.* neglected to get preſented at the next court, and was therefore void, according to the cuſtom of the manor, tho' *B.* afterwards ſold thoſe lands to *J. S.* who took a ſurrender, which he preſented, and was admitted; yet he having notice of *A.*'s right, Ld. Chan. decreed againſt him, and that *A.*'s defective ſurrender ſhould be made good. *Paſc.* 1708. *Jennings* and *Moor*, *ibid.* 609.

5. *A.* tenant in tail of the truſt of a copyhold eſtate, with remainder over, and the truſtees refuſing to ſurrender the legal eſtate to him, he brings his bill to compel them; and pending that ſuit he goes to the Lord's Court, and offers to ſurrender, but is refuſed, not having the legal eſtate; and thereupon he makes his will, and deviſes his eſtate to his wife and children: The court conceiving the will ſufficient to bar the intail of a truſt, and he having done all he could, decreed the eſtate to go according to the will. *Hil.* 1706. *Otway* and *Hutton*, 2 *Vern.* 583. Ceſtuy que Truſt *of a copyhold eſtate, having an equitable intereſt only, may deviſe it without any ſurrender.* Ibid. 680. per Cur'.

6. If a proviſion is made by will for younger children out of ſome copyhold lands, and there is a defect in the ſurrender, equity will ſupply ſuch defect againſt the eldeſt ſon and heir at law: Decreed *Hil.* 1682. *Hardham* and *Roberts*, 1 *Vern.* 132. *And many precedents ſaid to be in court of the like nature.*

7. So

7. So equity will ſupply the want of a ſurrender of a copyhold, as well for an elder ſon as a younger, in caſe of *Gavelkind* copyhold. *Vide* 2 *Vern.* 163. and ſeveral precedents there cited of ſurrenders ſupplied in favour of younger children, creditors and purchaſers.

Voluntary conveyance of a copyhold or other eſtate not helped in equity againſt the heir.

Vide the Caſe of *Vane* and *Fletcher*, *Eq. Ca. Abr.* Part 2.

8. But where one deviſed a copyhold eſtate to his grandſon; and my Lord *Somers* decreed the will good, and that equity ought to ſupply a ſurrender in ſuch caſe, as well as in caſe of a ſon; yet on appeal the houſe of lords reverſed the decree, and held, that equity ought not to ſupply ſuch defect in diſfavour of the heir at law, unleſs it were in favour of a ſon or daughter, nor then neither, if it was to diſinherit the eldeſt ſon. *Kettle* and *Townſend*, 1 *Salk.* 187.

9. A man ſeiſed of lands, which by the cuſtom of the manor could only paſs by deeds, ſurrender and admittance, and having a natural daughter, does by deed, in conſideration of 300*l.* therein mentioned to be paid by the ſaid daughter, grant and convey thoſe lands to her and her heirs; and ſhe was admitted accordingly; but no ſurrender was made of thoſe lands, as the cuſtom required; and at the foot of the admittance was a proviſo, that her reputed father ſhould hold and enjoy thoſe lands for his life; alſo in the deed was a covenant for farther aſſurance; no money was proved to be paid by her; and it being agreed that this conveyance was defective for want of a ſurrender; the queſtion was, whether equity could ſupply it in favour of a natural daughter; and it was held, that it could not, that though her father might be obliged by the law of nature to provide for her, yet here ſhe was to be conſidered as a mere ſtranger to him; that though the father might have a great affection for her, yet that was no ſuch affection as would raiſe an uſe at law; that the covenant for farther aſſurance being only auxiliary, and depending on the original conveyance, if that were void, the covenant muſt be void or repugnant; and decreed accordingly. *Mich.* 1717. *Furſaker* and *Robinſon*.

Prec. in Chan. 475. and *Gilb. Eq. Rep.* 139. S. C. *Gilb. Hiſt. Chanc.* 256. S. C. *Vid. Poſt.* 143. *p.* 15—152. *p.* 4. 2 *Vern.* 202. *Prec. Chanc.* 17.

10. A man deviſed his copyhold, being *Borough Engliſh*, to his eldeſt ſon, and deviſed houſes to his youngeſt ſon, which houſes were ſoon afterwards burnt down, and never entered upon by the younger ſon; and as this caſe was circumſtanced, the court would not ſupply the want of a ſurrender in favour of the eldeſt ſon. *Paſc.* 1692. *Cooper* and *Cooper*, 2 *Vern.* 265.

* 11. A younger ſon brings a bill, and ſurmiſes that a copyhold, which his father had deviſed to him by will, was ſurrendered to the uſe of his will, or however, that being for the advancement of a child, it ought to be made good here: he made no proof of any ſurrender, nor that a court was called for that purpoſe, nor any proof that any of the court-rolls were loſt (which was pretended); and he was well provided for without this copyhold; and the elder brother was in poſſeſſion twenty years by conſent of the plaintiff; ſo the bill was diſmiſſed, with coſts. *Paſc.* 1700. *James* and *James*.

* 12. A man ſeiſed of freehold and copyhold land, deviſes both for payment of debts and legacies, but the copy was not ſurrendered to the uſe of his will, and the freehold was ſufficient for the debts *(a)*; and the queſtion was, whether the court would

(a) S. P. in caſe of debts, where the freehold ſufficient. *Vide* the caſe of *Mallabar* and *Mallabar*, *Eq. Ca. Abr.* Part 2.

ſupply

ſupply the want of the ſurrender, and lay the legacies on the freehold, and the debts on the copyhold, as when there are ſimple contract creditors, and bond or judgment creditors, and perſonal aſſets not ſufficient to pay both; and the maſter of the rolls held, that the want of a ſurrender could not be ſupplied for the ſake of the legatees; and he ſaid that it was never yet done, eſpecially where they are mere ſtrangers, as here, and diſmiſſed the bill. *Hil.* 1699. *Raſter* and *Stock.*

* 13. A man ſeiſed of ſome freehold eſtate, and alſo of a copyhold eſtate, deviſed all his real and perſonal eſtate for the payment of his debts, and died without any ſurrender of the copyhold eſtate; and the freehold and perſonal eſtate not being ſufficient for the payment of the debts, it was urged, that a ſurrender ſhould as well be ſupplied in this caſe, as if no freehold eſtate had been deviſed at all; but Ld. Chan. ſaid, he thought the precedents had not gone ſo far, and that he could not relieve in this caſe, principally, becauſe the teſtator's intention did not appear to him to paſs the copyhold eſtate by a deviſe of his freehold, a copyhold being of the loweſt regard, and looked upon in the eye of the law, but as an eſtate at will. *Trin.* 1715. *Challis* and *Caſborn.*

* 14. A man being ſeiſed of ſeveral freehold and copyhold lands in *Bereford*, the freehold being about 72*l. per Ann.* and the copyhold about 16*l.* and being alſo ſeiſed of another freehold eſtate in *Ailſbury* of about 3*l. per Ann.* and all the ſeveral eſtates abovementioned, being in mortgage for 600*l.* the mortgagor made his will, and thereby deviſed all his lands in *Bereford* to his wife and her heirs, and died without iſſue, leaving his brother, who was his heir at law, and whether this court would ſupply the want of a ſurrender to the uſe of his will, as to the copyhold lands in *Bereford*, was the queſtion, and the maſter of the Rolls was of opinion, that it ought not; *firſt*, becauſe the words of the deviſe are ſatisfied by the freehold lands in *Bereford*, which paſſed thereby; and therefore it was not certain that he intended to give her the copyhold likewiſe; but 2*dly*, if he had ſo intended, yet the brother, who was his heir at law, would thereby be diſinherited of almoſt the whole eſtate, and have nothing but the 3*l. per ann.* in *Ailſbury*; and though the court will in all caſes ſupply the want of a ſurrender for payment of debts, yet not for the wife againſt an heir at law, who would be diſinherited thereby, or for younger children againſt an elder, to make them in a better condition than the elder. *Mich.* 1729. *Roſs* and *Roſs.*

CAP. XX.

Coſts.

(A) *Who ſhall pay Coſts, and in what Caſes.*

1. IF an executor is defendant in equity, and there is a decree againſt him, yet he ſhall not pay *(a)* coſts, though an executor, defendant at law, pays coſts in all caſes, for he cannot plead it at law in excuſe of aſſets. *Hard. Rep.* 165.

(a) The awarding of coſts is a matter diſcretionary in the court, and its power herein always exerciſed according to the circumſtances of the caſe, and the litigiouſneſs of either of the parties; if the court cannot relieve againſt a forfeiture, the bill will be diſmiſſed without coſts; frequently each party is to bear his own coſts; the expence either party is put to by the delays, contempts, *&c.* of the other, are only remitted or purged by the payment of coſts, unleſs the court order otherwiſe: Executors, guardians, truſtees, are uſually exempt from coſts, or awarded coſts out of the eſtate in their hands, unleſs they have greatly miſbehaved themſelves; alſo an heir at law, in moſt caſes, is exempted from paying coſts.

2. A ſolicitor proſecuted a ſuit in the name of a ſtranger, *who not being to be found*, the Maſter of the Rolls declared, that if there were one precedent in the caſe, he would make another, and order the ſolicitor to pay coſts. 1 *Chan. Ca.* 71.

* 3. *A.* brought a bill *in forma pauperis*, to which the defendant put in a plea and demurrer, which were both over-ruled; and it was inſiſted upon, that he ſhould have no coſts being at none; but my Lord *Sommers*, after long debate and inquiry of all the ancient counſel and clerks, who agreed that he ſhould have coſts, ordered him his coſt like other ſuitors; for though he is at no coſts, or but ſmall coſt, yet the counſel and clerks do not give their labour to the defendant, but to the *pauper*. *Paſc.* 1701. *Scatchmer* and *Foulkard*.

Contents, Prec. Chan. 219. 2 *Equ. Abr.* 633. *Cap.* lxxv.

4. If a bill be brought to call a truſtee to an account, and he by anſwer ſubmits readily to it, though on the account he be found in debt, yet he ſhall pay intereſt for the balance only from the time of the account liquidated, and no coſts if he has not miſbehaved himſelf. *Hil.* 1705. *Parrot* and *Treby*.

Prec. in Chan. 254. S. C.

5. If a new trial, or a ſecond iſſue be directed, it muſt be upon payment of coſts. 2 *Vern.* 75.

6. A demurrer was allowed, but without coſts, becauſe it came in by commiſſion without any anſwer. 1 *Vern.* 282.

7. If

7. If a feme ſole exhibits a bill, and pending the ſuit, marries, and the baron and feme bring a bill of revivor, and obtain a decree with coſts, they ſhall have the coſts of the whole ſuit, excepting the bill of revivor; although it was objected, that the abatement was the party's own act; and that if the defendant had been in the right, and ſo to have coſts, yet he could not have compelled the plaintiffs to revive. *Paſc.* 1685. *Durbain* and *Knight*, 1 *Vern.* 318. *That he might have compelled them to revive*, vide *Title* Abatement and Revivor, *Letter* (A).

8. Upon a motion to diſmiſs a bill, wherein the plaintiff had proceeded to an anſwer only, with twenty ſhillings coſts. *Per* Ld. K. That was a rule made at leaſt fifty years ſince; and there is no reaſon, if a defendant had been put to greater charge, why he ſhould not have his full coſts, and that for the future it ſhould be referred to a maſter to tax coſts in ſuch caſes. *Hil.* 34 *Car.* 2. 1 *Vern.* 116. *Ibid.* 334. Like order made.

9. If a ſecond mortgagee bring his bill to redeem the firſt mortgagee, who had been put to great charge in foreclоſing the mortgagor; the coſt which the firſt mortgagee has been at ſhall not be taxed, as in caſe of an adverſary ſuit, but he ſhall be allowed all his coſts and charges, as is done in caſe of a ſolicitor who lays out money for his client; and the profits of the mortgaged premiſſes ſhall be firſt applied to pay off thoſe coſts, before it goes to ſink the principal. Decreed *Mich.* 1690. *Lomax* and *Hide*, 1 *Vern.* 185.

10. A bill of exchange was obtained by fraud and ill practice; and the court declaring it a groſs fraud, ordered the party coſts to be aſcertained by his oath. 2 *Vern.* 123.

11. If a copyholder commits a forfeiture, which is found ſo at law, and he afterwards exhibits a bill to be relieved, it muſt be on payment of coſts both at law and in equity. *Ibid.* 537. But if it were in ſuch a caſe, as that the court could not relieve, yet they would not decree coſts againſt him.

Pret. in Chan. 111. S. C. but not S. P: *Vide* this *Ca. Eq. Abr.* Pt. 2.

12. The commiſſioners of charitable uſes cannot decree coſts on the ſtatute 45 *Eliz.* but if there be an appeal from their decree, Ld. Chan. may decree the coſts, not only of the appeal, but likewiſe of the commiſſion; and though they decree coſts, yet that ſhall not, upon an appeal, be ſufficient to reverſe the decree; for Ld. Chan. may either increaſe or leſſen the coſts, or exempt the party from them intirely. *Paſc.* 1700. *Rockley* and *Keyly*.

CAP.

CAP. XXI.

Courts and their Juriſdiction.

(A) *Concerning the Juriſdiction of the ordinary and limited Court in Chancery, proceeding according to Law.*

(B) *Concerning the Juriſdiction of the extraordinary and unlimited Court in Chancery, proceeding according to Equity.*

(C) *Concerning the Juriſdiction of Chancery in Foreign Parts.*

(D) *Concerning the Juriſdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.*

(E) *How far Chancery will exert a Juriſdiction in Matters cognizable in the inferior Courts, as the Eccleſiaſtical Courts, Univerſity Courts,* Cheſter, Durham, &c.

(A) *Concerning the Juriſdiction of the ordinary and limited Court in Chancery, proceeding according to Law.*

1. IN Chancery there are two courts, the one ordinary, which proceeds according to the laws and ſtatutes of the realm, called the Petty Bag Side, and which has been a court time out of mind: The other is called the Extraordinary Court, and proceeds according to the rules of equity. 4 *Inſt.* 79. 2 *Inſt.* 552.

2. The

2. The *(a)* ordinary court hath power to hold plea of *Scire Fac.* for repeal of the King's letters patent, *Monstrans de droits*, traverses of offices, petitions in chancery, of *Scire Fac.* upon recognizances in this courts, writs of *Audita Querela*, and *Scire Fac.* in nature of an *Audita Querela*, downents in chancery, the writ *de dote assignanda* upon offices found, executions upon statute staple or recognizances in nature of a statute staple upon the act 23 *H.* 8. but the execution upon a statute merchant is returnable either into the *K. B.* or *C. B.* 4 *Inst.* 80.

(a) This court had heretofore great extent of jurisdiction and multiplicity of business, especially whilst tenures remained as they were at the common law, and before the erection of the court of wards.

To this day there are held in this court, pleas of *Scire Facias* for repeal of the King's letters patent, petitions, *Monstrans de droit*, traverses of offices, *Scire Facias* upon recognizances, executions upon statutes, and pleas of all personal actions, by or against an officer or minister of this court.

3. This court is *Officina Justitiæ*, out of which all original writs and commissions, which pass under the great seal, do issue; and for these ends this court is always open, so that one from hence may in vacation have a *habeas corpus*, prohibition, &c. which issue out of other courts only in term-time. 4 *Inst.* 80, 81.

4. All personal actions, by or against any officer or minister, in respect of their service or attendance, may be determined in this court. *Ibid.* 80.

5. This court cannot hold plea of land, but it may of trespass or debt. 20 *H.* 6. 32.

6. The proceedings in this court are all in *Latin*, but they are not inrolled in rolls, but remain *in Filaciis.* 4 *Inst.* 80.

7. If the parties descend to issue, this court cannot try it by a jury, but the Lord Chancellor delivereth the records with his proper hands into the King's Bench, to be tried there; because for that purpose both courts are accounted but one, and after trial had to be *(b)* remanded into chancery, and there judgment to be given: But if there be a demurrer in law, it shall be argued and adjudged in this court. *Ibid.*

(b) But *quære* whether the constant practice has not been to give judgment in the King's Bench. *Vide All.* 16, 17. *Hill.* 84, 94. *Cro. Jac.* 11. 2 *Rol. Abr.* 349. and 2 *Sand.* 27. where it is resolved, that if there be a demurrer for part, and issue for part, the whole record shall be transmitted into *B. R.* and the judgment given there; and 2 *Sand.* 23. S. P. and there said, that the books cited 4 *Inst.* 80. do not warrant the opinion. But if the issue is to be tried otherwise than by a jury, as by the bishop's certificate, &c. judgment shall be given in chancery. 1 *Jon.* 80. *Lat.* 3.

1 *Bac. Abr.* 587. * 8. An inquisition was taken, and a forfeiture of the office of warden of the *Fleet* found, and the defendant pleaded to issue; and after issue joined, several other persons came in by way of *Monstrans de droit*, and pleaded; and a demurrer to them; and the record was carried into *B. R.* by the clerks of the petty bag, without any order of the court, in order to have the issue tried. And now two questions were moved; *first*, whether the record were well removed, because it was done by the clerks of the petty bag, because it ought to be by the Lord Chancellor *propria manu.* 2*dly*, whether the record be entirely removed, there being an issue as to one, and a demurrer to the rest. As to the first point, Ld. K. was of opinion clearly, that the record was well removed; for what is done by the hand of the proper officer of the chancellor, may be well enough said to be done by him *propria manu.*

And

And though the clerk of the petty bag carrying the record without an order, has committed a fault to this Court; yet that will not prevent the record from being well removed: and as to the ſecond he was of opinion, that the record was intirely removed, on conſideration of the caſes of *Jefferſon* and *Dawſon*, 2 *Saund.* 6. *Rex* and *Stoughton*, *Ibid.* 157. and *The Prince's* Caſe, 8. *Co. Mich.* 1700. *Rex* and *the Warden of the Fleet.*

* 9. In a cauſe on the *Latin* ſide, on a motion that the defendant might ſtand committed for not vacating his Letters Patent of Repriſals, it was moved that they might be at liberty to bring a writ of error in the King's Bench, for which was cited *Dyer* 315. 4 *Inſt.* 80, *&c.* But Ld. K. ſaid all theſe books were founded only on the ſingle opinion of Lord *Dyer*; and that he thought the juriſdiction of Chancery, even of the *Latin* ſide, not ſubjected unto, nor to be controuled by the King's Bench; and that he would (*a*) injoin all ſuch writs of error. *Hil.* 1682. *Rex* and *Cary.* 1. *Vern.* 131. 3. *C.* and *P.*

(*a*) That upon a judgment given in this Court a writ of error doth lie returnable into the King's Bench. *Vide* 13. *Ed.* 3. 25. *Aſſ.* 24. *Dyer* 315. *Plow.* 393. and *per* Lord *Coke*, the ſtile of the King's Bench is *coram Rege*, but the ſtile of the Chancery is *coram Rege in Cancellaria*, and *Additio probat Minoritatem.* 4 *Inſt.* 80.

(B) *Concerning the Juriſdiction of the extraordinary or limited Court in Chancery, proceeding according to Equity.*

1. THE King cannot grant a commiſſion to determine a matter of equity, but it ought to be determined in Chancery, which hath had (*a*) juriſdiction time out of mind. 12. *Co.* 113.

(*a*) That all the Courts of *Weſtminſter*, *viz.* the Chancery, proceeding according to law, King's Bench, Common Pleas, and Exchequer, have had juriſdiction time out of mind, ſeems ſettled by the beſt authorities. 9. *E.* 4. 53. *b. Doctor* and *Student*, *c.* 7. 4 *Inſt.* 78. *Hob.* 63. But at what time the Court of Chancery firſt exerciſed an extraordinary power of acting and decreeing according to the rules of equity, ſeems, from the diſtance and obſcurity of the matter, very doubtful: It is however agreed, that its commencement is much more modern than any of the other Courts; that neither the *Mirror*, *Glanvil*, *Bracton*, *Britton*, or *Fleta*, mention any thing of this Court, as proceeding according to the rules of equity. The moſt probable opinion is, that the equity ſide of the Court of Chancery began in the time of *E.* 3. *Lambard*, in his *Archaion.* 62. ſays, That when the Courts of Chancery and King's Bench ceaſed to be ambulatory, and became ſettled Courts in a certain place, (*which was the* 4 *E.* 3.) that then the King committed to his Chancellor, together with the charge of the great Seal, his only legal, abſolute, and extraordinary pre-eminence of juriſdiction, *&c.* but the writ or proclamation, 22. *E.* 3. directed to the Sheriff's of *London*, by them to be made public, ſeems to have given it an eſtabliſhment, by which the King commanded, that all buſineſs, relating as well to the common law of the kingdom, as to ſuch by ſpecial grace cognizable by him, ſhould be proſecuted before the Chancellor, *&c.* and this delegation afterwards received the ſanction of an act of Parliament, 36 *E.* 3. which act is thought, by others, to have firſt given it authority; *vide* 1 *Lev.* 242. that this Court did from this time exerciſe a juriſdiction in matters of equity, ſeems evident from the rolls of Parliament; *vide* 1 *Rol. Abr.* 372. And the complaints made in parliament of the exerciſe of this power to the ſubverſion of the common law; *vide Rot. Parl. Ann.* 2 *R.* 2. 7 *R.* 2. and this occaſioned the ſtatute 13 *R.* 2. *c.* 6. which reciting, that people were compelled to come before the King's Council, or in the Chancery, by writs grounded on untrue ſuggeſtions, enacts, that the Chancellor for the time being, pretently after ſuch ſuggeſtions be untruly found, and proved untrue, ſhall have power to ordain and award damages according to his diſcretion, to him who is ſo untruly troubled as aforeſaid, *&c.* which inſtead of diminiſhing, increaſed the power and juriſdiction of this Court.

2. A cause shall not be examined upon equity in the Court of Requests, Chancery, or other Court of equity, (*a*) after judgment at the common law. 1 *Rol. Abr.* 381.

(*a*) The reasons given were, 1 *Bac. Abr.* 589.

first, because it draws the matter determinable by the common law *ad aliud examen*, *viz.* a trial by witnesses; 2*dly*, after judgment the parties ought to be at peace and quiet; and if it should be otherwise, every plaintiff would begin in equity, which would tend to the utter subversion of the common law; 3*dly*, a court of equity, being no Court of Record, cannot hold plea of any thing of which judgment is given, which is a judicial matter of record. 3 *Inst.* 123. But as the allowed province of equity is to correct and moderate the rigour of the law, and likewise to give relief in cases for which human wisdom was not capable of providing positive laws; surely it is but reasonable that equity should have a power of interposing after a judgment at law; especially if it be considered how uncertain the law is before it be determined; and as this reasoning has occasioned the contrary practice, which being now established, it will be sufficient only to mention the authorities on this head, *viz.* 4 *Inst.* 36, 91. 3 *Inst.* 123. *Dal.* 81. *Moor* 836. Pl. 1129. 916. Pl. 1300. 1 *Leon.* 241. 2 *Leon.* 115. 3. *Leon.* 18. 2 *Brownl.* 97. *Godb.* 244. 1 *Rol. Rep.* 71, 72, 252. 2 *Bulst.* 194, 284. 3 *Bulst.* 118, 120. *Lit. Rep.* 37. *Cro. Jac.* 335, 344. *March* 54, 83. *Cro. Car.* 595, 596. *Stile* 27. 1 *Sid.* 463. 1 *Mod.* 60. *Hard.* 23, 123. 2 *Bulst.* 301, 302. 3 *Bulst.* 115. 1 *Lev.* 241.

3. The Chancellor by a decree cannot bind the right of the (*b*) land, but can only bind the person; and if he will not obey it, the Chancellor may commit him to prison till he obeys it. 27. *H.* 8. 15.

(*b*) Sequestrations were first introduced by Sir *Nicholas Bacon* in Q. *Elizabeth's* reign, before which, Chancery found some difficulty in inforcing its decrees; and for some time after was controuled by the common law Courts. *Vide* 4 *Inst.* 84. 1 *Rol. R.* 86. 3 *Bulst.* 34. 1 *Rol. Rep.* 190. *Lit. Rep.* 166. Lord *Egerton* imposed a fine on Sir *Tho. Themilthrop*, for not performing his decree concerning lands of inheritance, and estreated the same into the Exchequer; but he was discharged of it; for otherwise, by a mean he might bind the interest of the land, when he had no power. 4 *Inst.* 84. So where the lands of one *Waller* were extended by a process out of Chancery, and he brought his assise in the Common Pleas, and was relieved. *Ibid.* A person committed to the *Fleet* for not performing a decree made subsequent and contrary to a judgment at law, was by *Habeas Corpus* out of the King's Bench admitted to bail, and afterwards discharged. *Cro. Jac.* 341.

4. Three things are to be (*c*) adjudged in a Court of Conscience; *first*, all covins, frauds and deceits, for which there is no remedy by the ordinary course of law; 2*dly*, accidents, as when a servant, obligor, or mortgagor, is to pay money on a certain day, and they happen to be robbed in going to pay it, relief is then to be had against the forfeiture; 3*dly*, breach of trust and confidence. 4 *Inst.* 84.

(*c*) It has been held, that a Court of equity could not decree against a maxim of law. 1 *Rol. Abr.* 376. And therefore it has been adjudged, that one executor could not compel the other to account. 1 *Rol. Rep.* 263. And that one jointenant could not sue his companion. 1 *Rol. Abr.* 376. And that if an obligee lost his bond, he was without remedy. *Ibid.* 375. Where the lessor entered upon the lessee, and suspended his rent, it was held that he had no remedy in equity. *Lat.* 149. So where the party became remediless by his own act, as by paying money without an acquittance. 1 *Rol. Abr.* 374. So where one made a promise for valuable consideration to make a lease; and it was held that the party could not sue on this promise in equity, because he might have an action on the case. *Ibid.* 380. But all these resolutions in the common law Courts have been long since exploded, and the constant practice otherwise. *Boni judicis est ampliare justitiam.*

5. A bill was brought for a discovery against an executor, and the executor prest for a dismission, because the plaintiff had the effect of his suit, *viz.* a discovery; but *per Cur'*, as to a dismission to law, because the plaintiff hath a discovery here, when this Court can determine the matter, it shall not be a hand-maid to other Courts, nor beget a suit to be ended elsewhere; and therefore retained the bill. *Mich.* 26. *Car.* 2. *Parker* and *Dee*, 2 *Chan. Ca.* 200.

6. If

. If *A.* ſues in Chancery for certain lands, and (*a*) after-
rds ſues in the Common Pleas for the ſame lands, the
urt of Chancery will grant an injunction to ſtay his pro-
dings in the Common Pleas till the matter is heard in Chan-
y. *Cary's Rep.* 71.

(*a*) The practice is either to diſmiſs his bill, or oblige him to make his election.

. If a man has his election to proceed at law, or in equity,
the Bill is for land and meſne profits, he may elect to
ceed in an ejectment at law for the poſſeſſion; and in equi-
upon the account; becauſe at law he can recover damages
the meſne profits, from the time only of the entry laid in
declaration. 1 *Vern.* 105.

. Equity will not ſuffer a penalty to be demanded, if the
ty will perform that for the non-performance of which the
alty is given. 2 *Chan. Ca.* 88.

. Equity will not aſſiſt a forfeiture (*b*). *Vide* 2 *Vern.* 127.
hen a Parſon brings a bill for Tithes, he muſt wave the for-
ure. 1 *Vern.* 60.

(*b*) S. P. in the caſe of *Brian* and *Acton*, *Eq. Ca. Abr.* part 2.

* 10. The bill was at the relation of ſeveral freemen of the
eavers Company, againſt the defendants and other bailiffs,
rdens and aſſiſtants of the ſaid company, ſetting forth their
orporation *tempore H.* 2. but that the freemen being impoſed
on, and abuſed, by the governing part of the corporation,
a further charter and rules granted them *tempore Car.* 1.
that the defendants had been guilty of many breaches and
lations of their charters, and had oppreſſed the freemen,
and mentioned ſome particulars; and for a diſcovery of
reſt, and that they might be decreed for the future to obſerve
charters, and to have an account of the revenue of the corpora-
which the defendants had miſ-ſpent, *&c.* was the end of the
; to which the defendants demurred; becauſe as to part of
bill; it was to ſubject them to proſecutions at law, and to
Quo Warranto: And as to the other parts, the plaintiffs had
edy by *Mandamus*, information, or otherwiſe, and not
e; and of the ſame opinion was Ld. K. who ſaid it would
rp too much on the King's Bench; and that he never heard
ny precedent for ſuch a caſe as this, and ſo allowed the de-
rrer. *Mich.* 1705. *Attorney General* and *Reynolds & al'.*

* 11. If a truſtee does, by fraud and combination with the
ſuy que Truſt, endeavour to evade any penal law, as the ſtatute
Simony, *&c.* under pretence that a truſt is only cognizable
equity, and that equity ſhould not aſſiſt a penalty or forfei-
e, yet Chancery will aid remedial laws, and not ſuffer its own
ions to be made uſe of to elude any beneficial law. *Paſc.*
6. *Attorney General* and *Hindley.*

* 12. The plaintiff brought her bill to have an account of the
l and perſonal eſtate of her late huſband, and to have ſatis-
ion thereout for defect of value of her jointure-lands, which
covenanted to be and to continue of ſuch value: The defen-
nts inſiſted it was a matter properly triable at law, and ſhe
ght to be ſent there to try it; for if ſhe were damnified,
s court could not aſſeſs damages; but Ld. Chan. ſaid, the
ſter might inquire into it well enough; and therefore ſent
o him to examine and report, and ſaid, if he found there
re any difficulties in it, he could ſend it to be tried after-
rds. *Mich.* 1729. *Hedges* and *Everard.*

* 13. A devisee of lands being in possession of them, brin
a bill to prove the will, and prays relief; the heir brings
the cause *ad requisitionem Def'tis*, and insists the bill ought
be dismissed, because no merit for a voluntary devisee, wh
no debts or legacies are to be paid, to have a decree against t
heir; but the master of the rolls said, It is the business of th
court to quiet possessions; and gave the defendant a year to
the validity of the will, and then to resort back to the cou
Hil. 1702. *Woodgate* and *Woodgate.*

Prec. in Chan. 89. S. C. 1 *P. Wms.* 107. 2 *Vez.* 619.

14. The plaintiff's father married Sir *James Langham*'s o
daughter, and upon the marriage articles were entered i
between the defendant and the plaintiff's father by which
defendant covenants that he would, within six months af
the marriage, pay the plaintiff's father 10,000*l.* and that
executrix should pay him 10,000*l.* within six months after
death; and the plaintiff's father covenanted to make the wif
a jointure of 1500*l.* but no covenant for making any settlem
upon the children: The marriage took effect, and the defe
ant paid the 10,000*l.* and the jointure was made, and bo
the plaintiff's father and mother being dead, and the defend
being grown very old, and having married a fourth wife,
plaintiff, his grandson, brought this bill, pretending that
defendant was grown very weak in his understanding, a
wholly influenced by his wife, and it was greatly fear
would spend or make away his estate, and not leave whe
withal to pay the 10,000*l.* at his death; and therefore to h
the money paid presently, the defendant having an allowa
of the interest, or at least that he might give better security
pay it when it became due, was the bill: The defendant swo
by his answer, that on the marriage-treaty no other secur
was insisted upon but the covenant; and that if there was,
would not have consented to it; and though it was insis
upon, that this was like the case of executors, who are eve
day compelled to give security for the payment of lega
payable at a future day; yet Ld. Chan. dismissed the bill, a
said, that to do it here would be to alter the terms of the agr
ment; and that though this court had authority to com
executors to give security, yet it was because they were co
dered as trustees for the legatees, and no agreement one w
or other. *Hil.* 1698. *Earl of Warrington* and *Sir James La*
ham. But upon an appeal to the House of Lords, the matter
compromised.

* 15. The plaintiff having recovered judgment against *J.*
(but no writ of execution sued out) supposing some particu
effects of *J. S.*'s to be in the defendant's hands, brought a
to discover them, in order to subject them to his judgme
The defendant demurs, because there is no equity to com
such a discovery, and no such bill would lie against the deb
himself, much less against a third person. Ld. K. seemed to ag
it would not lie against the debtor himself, nor to have a ge
ral discovery from a third person, but only for particular thi
as this bill was; and over-ruled the demurrer. *Mich.* 17
Taylor and *Hill.* *Vide bills of discovery*, Title *bill.*

16. T

6. The Court of Chancery may, by a bill in equity, aſide Letters Patent obtained by fraud. *Attorney General* ſus *Vernon*, 1 *Vern.* 277.

7. If a Conveyance be gained indirectly, though it be by d and fine, yet a Court of Equity can relieve againſt Reſolved *Mich.* 1693. *Woodhouſe* and *Brayfield*, 2 *Vern.*

18. A bill was brought to have a will ſet aſide, being ob- ed by fraud and circumvention; and Ld. Chan. was clear pinion, that a will may in equity be ſet aſide for fraud or umvention. *Mich.* 1700. *Welby* and *Thornagh.*

2 *Vern.* 700.
1 *P. Wms.* 288.
c contra. Eq. Ab. 406. Pl. 4.
2 *P. Wms.* 270.

19. But it has ſince been decreed in the Houſe of Lords, a will of a real eſtate could not be ſet aſide in a court equity for fraud or impoſition, but muſt firſt be tried at on *deviſavit vel non*, being matter proper for a jury to in- e into. 28 *July* 1728. *Bramſby* and *Kerridge.*

2 *Atk.* 424.
3 *Atk.* 17.
Will. edit. of *Harriſſon's* Chan. 22.

Concerning the Juriſdiction of Chancery in Foreign Parts.

F there are two jointenants of lands which lie in *Ireland* and one of them prefers a bill for an account of the its, and for a partition of the lands, the bill will be good the profits which are in the perſonalty, but not ſo as to partition, which is in the realty; for a commiſſion to make ition cannot be awarded into *Ireland.* *Hil.* 27 *Car.* 2. *wright* and *Pettus*, 2 *Chan. Ca.* 214.

A. obtains an annuity or rent-charge, charged on cer- lands of *B*'s in *Ireland*; *B.* ſuggeſting ſome fraudulent tice here in *London*, *in obtaining it*, exhibited his bill againſt eing here to be relieved; *A.* pleaded to the juriſdiction he court, the land lying in *Ireland*; but the plea was over- d, and he was ordered to pay coſts for endeavouring to the court of its juriſdiction: *Per Nottingham* C. *Mich.* a. *Earl of Arglaſſe* and *Muſchamp*, 1 *Vern.* 77.---*Ibid.* 135, . *and the former reſolution affirmed by* North *Ld. K. upon a re-* ing, *who ſaid, that the objection, that the court could not ſe-* er *the lands in* Ireland, *was of little weight, for that it did* ppear *but that the defendant had other lands in* England, ch *would be ſubject to a ſequeſtration.*

So where a bill was exhibited againſt *A.* to anſwer a ract made of Lands that lay in *Ireland*; and though the s lay in *Ireland*, and the title was under the act of ſettle- t there, yet a *Ne exeat Regnum* was granted, and proceſs inſt him to anſwer; and when he afterwards went into nd without anſwering, he was ſent for by ſpecial order the King, and made to anſwer the contempts, and to a- the juſtice of the court.' *Archer* and *Preſton*, cited by Ld. n. 1 *Vern.* 77.

If a truſtee lives in *England*, the Chancery here may de- the truſt, though the lands lie in *Ireland*; although it was cted, *firſt*, that in this caſe there had been two judgments in

in the courts of law in *Ireland*, and three bills in equity; 2*dly*, that the truſtee came here occaſionally, and that it would be unreaſonable to keep him from his concerns to attend this ſuit; 3*dly*, that the caſe ariſes upon facts properly triable in *Ireland*, *viz.* Whether *Ceſtuy que Truſt* were the ſame perſon who died in rebellion, which was twice tried before in *Ireland*, and found againſt the plaintiff; 4*thly*, That this caſe depends on the conſtruction of the act of ſettlement in *Ireland*. But theſe objections were over-ruled, the proof being full as to the identity of the perſon; two chief juſtices concur with Ld. Chan. that the judges here were proper expoſitors of the *Iriſh* laws. *Mich.* 1686. *Earl of Kildare* and *Sir Maurice Euſtace and Fitzgerald*, 2 *Vern.* 419.

5. The bill was, that the defendant might redeem a mortgage of the Iſland of *Sarke*, or be foreclоſed; the defendant pleaded to the juriſdiction of the court, that the iſland was part of the Dutchy of *Normandy*, and had laws of their own, and were under the juriſdiction of the courts of *Guernſey*; but the plea was over-ruled, becauſe the mortgage was of the whole iſland, and for that the defendant was ſerved here; *Equitas agit in perſonam. Paſc.* 1705. *Toller* and *Carteret*, 2 *Vern.* 494. *vide* 1 *Chan. Ca.* 221. where it is ſaid by Serj. *Maynard*, that court could not by decree bind the *Iſle of Man*, it being out of the power of any Sheriff (*a*).

(*a*) But an appeal lies before the King in Council from a decree in the *Iſle of Man*. *Vide* the caſe of *Chriſtian* and *Curphey*, *Eq. Ca. Abr.* part 2.

(D) *Concerning the Juriſdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.*

1. IF a cauſe has been heard in the Exchequer, and two ſeveral trials directed, *viz. Will or no Will*, and in both a verdict is for the plaintiff; and yet the court diſmiſſeth the bill, but without prejudice in law or equity; the plaintiff in an original bill in Chancery may have relief for thoſe matters. 1 *Chan. Ca.* 155.

2. A bill was exhibited in Chancery concerning tithes and bounds of a pariſh, which proceeded to anſwer and replication; then the plaintiff exhibited another bill in the Exchequer, and his witneſſes were examined, and now proceeds again in Chancery, and replies; the defendant pleaded the proceedings and examination in the Exchequer, and ruled good, as to the examination of the ſame matters, which being examined there, were not to be examined in Chancery. *Ibid.* 233.

3. A mortgagee brought a bill in the Exchequer to foreclоſe, the mortgagor exhibited a bill in Chancery to redeem, to which the mortgagee pleaded the former bill depending in the Exchequer, and the plea was over-ruled, with coſts; though it was urged

And Ld. K. ſaid, This court muſt den. juſtice to none, and a plaintiff has a liberty to commence his ſuit in what court he thinks fit; and that Chancery was the higheſt court of equity, and declared his opinion to be, that in any caſe, if the mortgagor exhibited a bill

that if the deputy remembrancer ſhould take the account one way, and a maſter here ſhould take it another, it would breed confuſion; and that if this court ſhould be of opinion, that there ought to be no redemption, and the Exchequer ſhould decree a redemption, the juriſdictions would claſh: But *per North* Ld. K. the Exchequer, though an ancient court of equity, yet is but a private court, and its juriſdiction properly was only for getting in the king's revenue, and for the king's officers, and they ought to keep within their proper bounds; and if there ſhould happen any of the inconveniencies mentioned, there are ſeveral precedents, that injunctions have gone to the Exchequer in ſuch caſes. *Hil.* 1683. *Earl of Newbourgh* and *Wren*, 1 *Vern.* 220.

redeem in the Exchequer, that the defendant there ſhould be at liberty to exhibit a bill to foreclose in this Court. *Ibid.* 221. in S. C.

* 4. A decree was obtained in the Exchequer againſt two of the inhabitants of *Bridgenorth*, to eſtabliſh a cuſtom for all the inhabitants there to grind at the king's mills; and this decree was had without any trial, and afterwards affirmed in the houſe of peers; and now this bill was brought in Chancery by other inhabitants of *Bridgenorth*, to prevent multiplicity of ſuits, and to examine witneſſes *in perpetuam rei memoriam*, and to diſcover evidences in the defendant's hands; and in the bill they deny that there is any ſuch cuſtom for grinding, &c. and alledge, that the former decree in the Exchequer was obtained by colluſion, and that the defendants would not bring any actions at law, till the plaintiff's witneſſes were dead; and they likewiſe pray a diſcovery, whether the inhabitants in new foundations, as well as old, are obliged to grind at the king's mills. To this bill the defendants pleaded the former decree in the Exchequer, and affirmance in the houſe of peers in bar, and alſo demurred to the bill, but had not, as was affirmed, denied the colluſion charged by the bill: And the court held, that the tenor of the bill was directly to queſtion the juſtice of the former decree, and that the charge of colluſion need not be anſwered, being only inſerted to give the court juriſdiction; and if there was any redreſs, it muſt be by application to the houſe of peers. *Mich.* 1699. *Jay & al'* and *Braine*.

5. The plaintiffs, as aſſignees under a ſtatute of bankruptcy pray an account of the eſtate of *Hind* the bankrupt, ſeiſed by the defendants on pretence of debts owing to the king, by virtue of ſeveral extents ſued out for that purpoſe, *viz.* one original extent for the king, and two other extents in aid by the defendants, who were farmers of the exciſe; it being objected, that this matter was properly cognizable in the court of Exchequer, which was the king's court of revenue; and that this court would not examine what was the *Quantum* of the debt due to the king, or how far the extents were neceſſary: The Ld. K. allowed the objection, and diſmiſſed the bill; and as to the precedents which had been produced, where this court had held plea in like caſes, he ſaid they did not come up to this caſe; for in the caſe of *Capel* and *Brewer* (*a*), the defendant, who ſued the extent in aid, confeſſed by anſwer he had ſufficient of his own eſtate to pay the king's debt; and in the caſe of *Cholmly* and *Sturt*, it appeared to be a fraudulent contrivance by an extent in aid, to gain a preference to a debt of an inferior nature. *Paſ.* 1701. *Brown* and *Trant*, 2 *Vern.* 426.

(*a*) 1 *Vern.* 469.

(E) *How far Chancery will exert a Jurisdiction in Matters cognizable in inferior Courts, as the Ecclesiastical Courts, University Courts,* Chester, Durham, &c.

1. IF *A.* and *B.* are made executors, and both prove the will, but *A.* only acts as executor, and dies, leaving his wife executrix, and a legatee sues *B.* in the spiritual court, he being liable there by his joining in the probate of the will; yet *per* Ld. K. the judgments of the ecclesiastical courts are as well subject to the equity of this court as the judgments at law; and he inclined to give relief in this case, the party being without remedy by appeal; for the delegates are to judge according to the ecclesiastical laws. *Pasc.* 23 *Car.* 2. *Vanbrough* and *Cock*, 1 *Chan. Ca.* 200.

2. If an infant legatee sueth in the ecclesiastical court, and afterwards in Chancery, the suit depending in the ecclesiastical court cannot be pleaded in bar; for there is no such security for the infant's advantage as here, especially as to interest and bringing in an account. *Hil.* 33 *Car.* 2. *Howel* and *Waldron*, 2 *Chan. Ca.* 85.

2 *Vent.* 362. S. P.

3. A bill was brought to have distribution of an intestate's estate, according to the statute 22 *Car.* 2. to which the defendant pleaded, that the ordinary is made judge, and appointed to take security, and that the plaintiff ought not to sue here; but Ld. Chan. over-ruled the plea. *Pasc.* 34 *Car.* 1. *Pamplin* and *Green*, *Ibid.* 95.

4. The widow in the spiritual court set up a procurator for her children, the infants, and gets her account passed there, and each child's proportion ascertained there, and distribution decreed; and on giving new security, got the old security discharged; but the court, without regard to the proceedings in the spiritual court, decreed an account of the whole estate. *Pasc.* 1688. *Bissel* and *Axtel*, 2 *Vern.* 47.

5. If there be fraud in obtaining a will relating only to a personal estate, let the fraud be ever so apparent; yet it is not examinable in Chancery after the will is proved in the spiritual court, and so long as that probate is in force. *Archer* and *Mosse*, *Ibid.* 8.

6. A will of a personal estate obtained by fraud, and by getting the party to swear, that it should not be revoked; yet after probate in the spiritual court is not to be controverted in equity; but if a party claiming under such will comes for any aid into equity, he shall not have it. *Nelson* and *Oldfield*, *Ibid.* 76.

7. If the plaintiff exhibits his bill to be relieved touching some lands in *Cornwall*, and the defendant, being head of *Exeter College* in *Oxford*, pleads the privilege of the university of *Oxford*, and that he ought to be sued in the Vice-Chancellor's court in *Oxford* only, his plea will be over-ruled; for matters of freehold are excepted out of their charter; and their

court

ourt can, at beſt, have but a lame juriſdiction as to lands in *Cornwall*. *Hil.* 36 *Car.* 2. *Stephens* and *Dr. Berry*, 1 *Vern.* 12.

8. The plaintiff ſets forth in his bill a contract under ſeal with he defendant, for making a leaſe of certain lands in *Middleſex*, nd prays an execution of the agreement; to which the defen- ant pleaded, that he was head of a college in *Oxford*, and ets forth the charters of, &c. impowering the univerſity to nquire and proceed in all pleas and quarrels in law and equity, c. and concluded to the juriſdiction of the court; but the lea was over-ruled; *firſt*, becauſe the charter ought properly to extended to matters at common law only, or to proceedings equity which might ariſe in ſuch caſes, and not to mere atters of equity, which are originally ſuch, as to execute a- reements *in ſpecie*: 2*dly*, conuzance of pleas is never to be llowed, unleſs the inferior juriſdiction can give remedy; ere they can only excommunicate or impriſon, but cannot roceed to ſequeſtration of the lands in *Middleſex*. *Hil.* 36 *Car.* *Draper* and *Dr. Crowther*. 2 *Vent.* 362.

9. A claim of privilege cannot be put in by writing, but it uſt be by way of plea, but it need not be on oath. 1 *Chan.* 237. The privilege of any inferior court cannot be objected at hearing, but muſt be pleaded. 2 *Vern.* 484.

10. A man cannot ſue in the Chancery at *Cheſter*, for a ing which in intereſt concerns the Chancellor there, becauſe cannot be his own judge, and therefore he may in this caſe e in the Chancery of *England*; otherwiſe there would be a llure of right. *Sir John Egerton* and *Lord Derby*, 12 *Co.* 113.

11. If a man hath cauſe to complain in equity of a matter iſing within the county palatine of *Cheſter*; if the defendant es out of the county palatine, he may be ſued in the Chan- y here, or otherwiſe there would be a failure of juſtice; proceedings in equity binding the perſon only, if the per- lives out of the juriſdiction of the chamberlain of *Cheſter*, re can be no relief there. *Ibid.*

12. A bill was exhibited to have an account of the profits lands, which the defendant had received on truſt for the intiff during his minority, and for money received on bonds onging to the plaintiff, and for writings, &c. The defend- pleaded, that the lands lay in *Cheſhire*, and that he lived *Cheſhire* in the county palatine of *Cheſter*, and therefore within the juriſdiction of this court; and tho' precedents re ordered to be ſearched, and on view of them a maſter tified, that the privilege of the counties palatine was al- vable between parties dwelling in the ſame county, and for ds there; yet the plea was over-ruled. *Hil.* 14 *Car.* 2. *worth* and *Davies*, 1 *Chan. Ca.* 40.

2 *Freem.* 159. 1 *July* 14 *Car.* 2. S. C. and P.

13. Bill to bring in one that lived out of the juriſdiction of *don*, to come in and give ſecurity for the orphans portions ording to the cuſtom of the city: Ld K. decreed plaintiffs y the cuſtom. *Mayor and Aldermen of London* and *Slaughter*, 203.

CAP.

CAP. XXII.

Creditor and Debtor.

(A) *Where there is a Proviſion by Deed or Will for Payment of Debts, what Debts ſhall be paid.*

(B) *The Order and Manner in which Debts ſhall be paid, or what Precedence one Kind of Debt ſhall have over another in Equity.*

(C) *What ſhall be a good Payment, to whom and at what Time.*

(D) *Where Debts of a different Nature are due, and a general Payment is made, to which Debt ſhall it be applied.*

(E) *What Conveyance or Diſpoſition ſhall be fraudulent as to Creditors,*

(A) *Where there is a Proviſion by Deed or Will for Payment of Debts, what Debts ſhall be paid.*

1. IF *A.* makes a deed of truſt of lands for payment of his Debts, to take effect after his death, and the words of the deed are, *monies owing by him*, and a ſchedule is annexed to the deed, wherein mention is made of 1000*l.* to *A.* and 500*l.* owing to *B.* and then there is this *Item, viz. The Sum of* 3000*l. owing to other perſons*; this deed ſhall not be conſtrued to charge the lands with debts contracted afterwards, though they exceed not the ſum mentioned in the ſchedule. Decreed *Hil.* 1682. *Purefoy* and *Purefoy*, 1 *Vern.* 28.

2. *A.* had a demand of 500*l.* againſt *B.* and had run it up to 2700*l.* and obtained a decree for it in Chancery, from which *B.* appealed to the houſe of lords, where the decree was affirmed: It was obſerved, that *B.* at the pronouncing this decree in the houſe of lords, fell down in a ſwoon, and within a week afterwards died, as ſuppoſed, of grief; but he firſt got a petition anſwered, for a rehearing, and in his ſickneſs deviſed all his lands for the payment of his debts; and Ld. K. ſaid, that this could not be intended a proviſion for *A*'s demand, which he denied upon oath, and in which he died a martyr; however at length decreed, that after all debts upon ſimple contract were paid, *A.* ſhould come in and be paid his debt, if he could find aſſets. *Hil.* 1682. *Norden* and *Norden*, 1 *Vern.* 142 *Ibid.* 4[illegible]

S

S. C. cited, and ſaid to be adjudged by Ld. K. *North*, not to lie within the intent of the proviſion for payment of the teſtators debts.

3. A man deviſed his lands for the payment of his juſt debts; the teſtator, whilſt a ſtudent at *Cambridge*, (but of age) had by ſurpriſe been prevailed upon to give a covenant for payment of a portion to his ſiſter; but he afterwards conteſted this debt; and though he was decreed to levy a fine to ſubject lands for the payment of it, yet he refuſed ſo to do: *per Cur'*, this being a juſt debt, ſhall be paid, though perhaps not within the intent of the proviſion. Decreed *Hil.* 1686. *Lord Hollis* and *Lady Car*, 1 *Vern.* 431.

4. If one by will or deed ſubject his lands to the payment of his debts, debts barred by the ſtatute of limitations ſhall be paid; for they are debts in equity, and the duty remains; the ſtatute hath not extinguiſhed that, though it hath taken away the remedy. 1 *Salk.* 154. 2 *Vern.* 141, S. P. decreed.

5. A man borrows a ſum of money on the mortgage of a ſhip, and covenants, that whatever money the mortgagee ſhould advance for inſurance of the ſhip in a voyage ſhe was then about to make, that he would repay it; but there was no covenant for repayment of the principal money itſelf; the mortgagee inſures the ſhip, and the mortgagor repaid him that money; then the ſhip proceeds on her voyage, and returns home; and being afterwards to go out on another voyage, the mortgagee treated with a perſon concerning the inſurance, but could not agree for the rate, and thereupon the ſhip went out and was loſt in the voyage; and now between the mortgagee and the executors of the mortgagor, the queſtion was, whether the mortgagee ſhould come in for his principal money as a creditor by ſimple contract; and it was argued that he ought not, becauſe there was no covenant for payment of the mortgage-money, ſo that he muſt be ſuppoſed to reſt himſelf on the ſhip only for his ſecurity, and that being loſt, ſo is his money too; but on the other ſide it was urged, that if he had taken no ſecurity at all for his money, he had then, without queſtion, been a creditor by ſimple contract; and ſurely the taking ſecurity ought not to put him in a worſe condition, eſpecially now that the ſecurity being loſt and gone, his debt reſts wholly on the ſimple contract; and of the ſame opinion was Ld. Chan. *Harcourt*, and pronounced his decree accordingly 1713. *Thomas* and *Terrey*. *Gilb. Eq. Rep* 110, S. C. *M.* 1 *Geo.* 1.

6. If a man ſeiſed in tail of lands, of which there is a term in truſtees to attend the inheritance, levies a fine, and by deed ſubjects the land to a debt of 1000*l.* but declares, that after the debt paid, the land ſhould be to the old uſes, and after deviſes the land for payment of all his debts, the lands ſhall be liable to all his debts in general. Decreed *Mich.* 1682. *Turner* and *Gwynne*, 1 *Vern.* 99. 100. *But the reporter makes a* quære, *for it ſeems he was but tenant in tail of the inheritance, and ſo could not charge it by his will, unleſs it be intended he had ſtill a power of doing it lodged in him by reaſon of the fine, notwithſtanding he had declared, that after the payment of the* 1000*l. it ſhould go to the former uſes.*

* 7. On

* 7. On the marriage of the plaintiff with *Edward* earl of *Warwick*, in 1696, previous thereto a ſettlement was made by the earl to the uſe of two truſtees, for ninety-nine years, if the earl and counteſs ſhould ſo long jointly live, in truſt, out of the rents and profits to pay to the counteſs, for her ſeparate and perſonal uſe, by way of pin-money, 400*l. per ann.* quarterly, and ſubject thereto that and the reſt of the eſtate was to the earl for life; remainder as to part to the counteſs for life for her jointure; remainder of the whole, as the ſaid eſtates ſhould determine, to the uſe of the firſt and other ſons of that marriage ſucceſſively in tail male, with remainder in fee to the earl; the marriage takes effect, and *July* 1701, the earl being taken ill makes his will, whereby he charges, as far as he was able, all his real eſtate with the payment of his debts, and ſoon after dies, leaving only one child, *Edward-Henry*, then earl of *Warwick*. At the time of his death there was a year and three quarters of the pin-money in arrear, and he was likewiſe indebted to ſeveral other perſons in conſiderable ſums of money, which his perſonal eſtate would not extend to pay and ſatisfy; and there being no executor named in the will, the lady *Eliz. Rich*, his ſiſter, as principal creditor, took out adminiſtration to him, with the will annexed; and nothing but the reverſion in fee of the whole ſettled eſtate being in his power to charge with the payment of his debts, this reverſion could not be affected or ſold during the continuance of the eſtate tail, as it was liable to be docked by a recovery by the tenant in tail; earl *Edward-Henry* attained his age of twenty-one years in 1719, and ſoon after levied a fine to the uſe of himſelf and his heirs, and in 1721, died without iſſue inteſtate and unmarried; and upon his death the eſtate deſcended to the defendant; and the plaintiff the counteſs, his mother, took out letters of adminiſtration to the ſaid earl *Edward-Henry*; and now this bill was brought by the counteſs for a ſatisfaction of the ſaid arrears of pin-money, and by the other creditors of earl *Edward*, for a ſatisfaction of their debts; and in order thereto, for an account of the real and perſonal eſtate of earl *Edward*; and that if the perſonal eſtate were not ſufficient, that the ſame might be paid out of the real eſtate, which now, by the failure of iſſue male, was become aſſets, according to the will of earl *Edward*. It was inſiſted upon, for the defendant, that the earl and counteſs living together, and no demand being proved to be made of theſe arrears of pin-money, that it was in the nature of a preſent of them to the earl, or a waiver of them, and that at moſt in ſuch caſes, the court never allowed more than a year's arrear; becauſe it was impoſſible, but that at the huſband's death ſome arrears muſt be, unleſs they were always paid punctually at the day, and therefore a year has been always held to be as much as was reaſonable to allow in thoſe caſes. But in this caſe the court allowed the whole, as the whole were proved to be in arrear; and that between huſband and wife, who lived well together, three quarters of a year made but little difference. Another point inſiſted upon for the defendant was, that by the fine levied by earl *Edward-Henry*, the eſtate-tail was extinguiſhed or conſolidated with the rever-

reverſion or remainder in fee in him, and that the plaintiffs title to demand their debts then attached upon the eſtate, and cited 1 *Salk.* 333. *Symonds* and *Scudmore*; and therefore, that the rents and profits received by earl *Edward Henry*, ought to be applied towards a ſatisfaction of the plaintiffs demands; and by conſequence that the plaintiff, the counteſs, being adminiſtratrix to the ſaid earl, had aſſets in her own hands for that purpoſe: But the court was clear of opinion, that the rents and profits received by earl *Edward-Henry* of his own eſtate, whereof he was then owner, ſhould not be applicable for that purpoſe before a demand made, becauſe till then he did no wrong in receiving the rents and profits of his own eſtate; and ſo it had been decreed lately, in the caſe of *Montague* and *Bord*, in this court. *Mich.* 1728. *Counteſs of Warwick* and *Edwards*.

(B) *The Order and Manner in which Debts ſhall be paid, or what Precedence one Kind of Debt ſhall have over another in Equity.*

Vid for this head, &c. 2 *Bac. Abr.* 432. 3, 4. *&c.*

1. IF lands are deviſed to truſtees for payment of debts; debts by ſimple contract, and debts by ſpecialty, ſhall be paid in proportion; and though the truſtees are creditors to the teſtator, or ſureties for him, yet they ſhall not be allowed to preſer themſelves. 2 *Chan. Ca.* 54. That all debts, when the deviſe is to a truſtee, ſhall be paid in average, except thoſe that affect the land. Decreed. *Vide* 1 *Vern.* 63.

2. But if the lands are deviſed to an (*a*) executor, they become legal aſſets, and ſhall be paid in a courſe of adminiſtration; and according to the precedency or ſuperiority at law. Decreed *Mich.* 1682. *Girling* and *Lee*, 1 *Vern.* 63. 2 *Chan. Rep.* 262, S. C.

(*a*) That they become legal aſſets, in the hands of an executor, reſolved 1 *Chan. Ca.* 248. 1 *Rol. Abr.* 920. *Hob.* 265.

3. If one deviſes lands to his nephew and his heirs, whom he makes his executor in truſt to ſell, for payment of debts and legacies, the debts and legacies ſhall be paid in average; for he having deviſed to him and his heirs, ſhews that he deſigned, that it ſhould go in a courſe of deſcent, and he to take as a truſtee. 2 *Vern.* 133. But *quære* whether the debts ſhould not be preferred; and *vide Ibid.* 248. the caſe of Sir *John Bowles* cited; where, upon a truſt for payment of debts and legacies, though it was decreed by Ld. K. *Bridgman*, that they ſhould be paid *pari paſſu*, and each to bear the loſs in average; yet lord *Nottingham* reverſed the decree, and ordered the debts to be firſt paid; and ſaid, He would not let a man ſin in his grave. Note; *This has ſince been the conſtant practice with reſpect to debts and legacies; but as to creditors, they ſhall be all paid in average, except ſuch whoſe debts affect the land.* Vide 2 Vern. 105.

Vid. 2 *Will. Rep.* 550. *&c.*

4. If on the eſtate of *J. S.* there are ſeveral mortgages, judgments and ſtatutes; and he likewiſe owes ſeveral debts by bond and ſimple contract, and ſome parts of his eſtate are mortgaged no leſs than thrice over; and in this manner, *viz.* to *A.* there is a ſubſequent mortgage of lands, on which *B.* had a prior mortgage of a moiety of the lands contained in *A's* mortgage, and alſo of ſeveral other parcels of land: *C.* has a prior

prior mortgage of the other moiety of the lands compriſed in *A*'s mortgage, and alſo of ſeveral other lands; and *J. S.* having ſubjected his eſtate for the payment of his debts, it was held by Ld. Chan. that to avoid confuſion, the ſubſequent mortgagees having a right to redeem, the real ſecurities ſhould be firſt paid, and then the bonds and ſimple contract debts in average; although it was urged, that the ſubſequent mortgages, *&c.* ſhould be paid in average with the bond and ſimple contract creditors, their ſecurities not affecting the lands, the legal eſtate being in the firſt mortgagee. It being likewiſe urged, that a judgment creditor ſhould have ſatisfaction before a ſecond mortgagee, as at (*a*) law, Ld. Chan. thought it reaſonable; but for the above reaſons left him to get it at law, if he could. Decreed *Mich.* 1682. *Child* and *Stephens*, 1 *Vern.* 101.

(*a*) An executor ſhall diſcharge a ſubſequent judgment before a prior ſtatute, becauſe of the notoriety of it.

4 *Co.* 59. But if the ſtatute be extended, whether the judgment-creditor may enter on the conuſee, *quære* and *vide* 2. *And.* 157. *Cro. Eliz.* 734, 822.

5. It was decreed at the rolls, that mortgages were to be paid in the firſt place, and then judgments, and then recognizances, *&c.* but upon an appeal to the houſe of lords, it was adjudged, that mortgages were not to be preferred to other real incumbrances; but that mortgages, judgments, ſtatutes and recognizances ſhould take place according to their priority, and as they ſtood in order of time. *Mich.* 1705. *earl of Briſtol & al'* and *Hungerford*, 2 *Vern.* 524.

Pree. in Chan. 190. S. C.

6. If creditors have joined in a bill, and obtained a decree for payment of their debts out of legal and equitable aſſets, none of them ſhall be permitted to obtain a preference of the others, by obtaining judgments againſt the executors; and *per* Ld. K. where there are legal and alſo equitable aſſets, the creditors who will take their ſatisfaction out of the legal aſſets, ſhall have no benefit of the equitable aſſets, until the other creditors, who can only be paid out of thoſe aſſets, have thereout received an equal proportion of their reſpective debts. Decreed *Paſc.* 1702. *Sheppard* and *Kent*, Ibid. 435.

7. If the teſtator ſeiſed in fee enters into a ſtatute, and deviſes a legacy of 500*l.* and the conuſee takes all the perſonal eſtate in execution, ſo that nothing is left to pay the legacy, equity will decree the real eſtate to ſtand charged with the legacy. 2 *Chan. Ca.* 4. *Ibid* 117, S. P. decreed.

8. If there is a debt owing to the king, equity will order it to be paid out of the real eſtate, that other creditors may have ſatisfaction of their debts out of the perſonal aſſets. 1 *Vern.* 455.

9. One died leaving a debt by judgment, and another due by bond, and the judgment-creditor being at a good underſtanding with the heir, levied his debt out of the perſonal eſtate; and *Hutchins* Ld. Comm. inclined to relieve the bond-creditor, and that he ſhould ſtand in the place of the judgment-creditor, and charge the land with his debt; for as the heir has often the aſſiſtance of a court of equity, in having the perſonal aſſets applied in eaſe of the real eſtate, it is but reaſonable that he ſhould do equity to others: But the reporter refers to the order. 2 *Vern.* 182.

10.

10. If one dies indebted by mortgage and ſimple contract, and the executor applies the perſonal aſſets in diſcharge of the mortgage, the ſimple contract creditor ſhall ſtand in the place of the mortgagee, and though one of them gets judgment of aſſets *cum acciderent*, yet as their relief is only in equity, they ſhall be paid in average. Decreed *Mich.* 1718. *Wilſon* and *Field-*, *Ibid.* 763. *Lucas's Rep.* 426, S. C.

11. But where *H.* ſeiſed in fee, and indebted by bonds, by will gives legacies to his children (whom he had otherwiſe provided for before) and deviſes his lands to his eldeſt ſon in tail; and he being alſo made executor, he pays the bonds with the perſonal eſtate, and the legatees brought a bill to come againſt the real eſtate in the place of the bond-creditors; the court ſeemed to admit, that if the lands had deſcended, the legatees might have been relieved in this manner; but ſince the teſtator had deviſed them, it was reſolved, that they ought to be exempted; for it was as much the teſtator's intention that the deviſee ſhould have the land, as the others ſhould have their legacies; and a ſpecifick legacy is never broke into in order to make good a pecuniary one; and the children being otherwiſe provided for, are not in the nature of creditors. *Per Harcourt* Ld. Chan. upon appeal from a decree of the maſter of the Rolls, who held, that the real and perſonal eſtate ſhould be charged, that both debts and legacies might be paid. *Hern* and *Meric*, 2 *Salk.* 416. 1 *Will. Rep.* 201, S. C. where it is ſaid, that in the caſe of *Clifton* ver. *Birt* Mich. 1720. this decretal order was produced, and it appeared, that this caſe was not reſolved by Ld. *Harcourt*, but adjourned for further conſideration. *Vide* alſo *Ibid.* 678, 681.

12. If lands are deviſed in truſt, to pay mortgages in the firſt place, and then legacies; and the truſtee is made executor, and mortgages the lands to pay other debts, the laſt mortgage ſhall be paid before the legacies. 1 *Vern.* 69.

13. The huſband, in conſideration of his wife's joining with him in a fine, and parting with her jointure of 40*l. per Ann.* gives her truſtee a bond to ſettle other lands of 40*l. per Ann.* on the wife for life, remainder to the heirs of her body; the huſband being indebted in other bonds dies inteſtate, and the wife takes adminiſtration, and confeſſes judgment to her truſtee, on which by another bond creditor. Decreed the wife's bond, as to herſelf only, to be performed before the plaintiff is paid; but the children to have no benefit of this bond preferable to the other bond-creditors. *Cottle* and *Frip*, 2 *Vern.* 220.

14. If *A.* purchaſes lands of *B.* and mortgages back theſe lands for part of the purchaſe-money, and gives a note to *B.* for 200*l.* the other part thereof, and *A.* deviſes theſe lands to be ſold for payment of his debts; this 200*l.* note, tho' for part of the purchaſe-money, ſhall not be preferred to other debts, being a charge on the lands in equity. *Mich.* 1692 *Bond* and *Bond*, *Ibid.* 281.

15. If a freeman of *London* gives a voluntary judgment, payable three months after his death, it ſhall be poſtponed to debts by ſimple contract, and to the widows cuſtomary part; but will affect the freeman's legatory part. *Fairbeard* and *Bowers*, *Ibid.* 202. *Prec. in Chan.* 17, S. C. *Rawlinſon*, Ld. Comm. ſaid he thought that the judgment ſhould

before legacies, if there had been any. S. C. cited by Lord *Talbot* in the caſe of *Cray*—*Vide Eq. Ca. Abr.* Part 2.

16. A voluntary bond ſhall not, in a courſe of adminiſtration, take place of real debts, tho' by ſimple contract, but ſhall, notwithſtanding, be paid before legacies. Decreed *per* Lord *Talbot*. *Jones* and *Powell.*

17. If

17. If a man recovers a judgment or ſentence in *France* for money due to him, the debt muſt be conſidered here only as a debt due on ſimple contract. 2 *Vern.* 540.

18. The arrears of rent incurred in the life-time of the teſtator, ſhall be paid before bond debts, though reſerved on a parrol leaſe. 1 *Vern.* 490.

19. If *J. S.* deviſes his lands for the payment of mortgages, judgments and recognizances that affected the land, and then other debts, and there is a recognizance not inrolled (*a*) it ſhall be taken but as an obligation, and be paid as a debt by ſpecialty. *Hil.* 1716. *Bothomly & al'* and *Lord Fairfax*, 2 *Vern.* 750.

20. So where a recognizance being inrolled by ſpecial order of the court, after the time for inrolling of it was elapſed; and the conuſor betwixt the date of the recognizance and the inrolling of it, borrowed money of *J. S.* upon a judgment, which was now over-reached by the recognizance, and the eſtate of the conuſor being in mortgage prior to the recognizance, that neither the recognizance nor the judgment could reach the eſtate without the aid of equity; and the court inclined to give the preference to the judgment-creditor. 2 *Vern.* 234. *Vide Ibid.* 272. That bond-debts and debts aſcertained ſhall be preferred to debts which only ſound in damages.

*21. *T. S.* entered into a bond, wherein he bound himſelf and his heirs to pay 100*l.* within ſix months after his death and became indebted to the plaintiff *Neave* in 45*l.* by ſimple contract, and died inteſtate, not leaving perſonal aſſets ſufficient to pay his debts; the defendant was his ſon and heir, and had real aſſets from him by deſcent of the value of 100*l.* and he took out adminiſtration to his father; and ſix days before the 100*l.* became due, by the condition of the bond, agrees with the obligee to convey the freehold lands deſcended to him in ſatisfaction of the bond, and the conveyances were drawn and ingroſſed accordingly; but before the execution of them, he gives the obligee thirty ſhillings to have the conſideration of the deed raſed, and made to be for ſo much money paid inſtead of the delivery up of the bond; but no money was paid, only the bond delivered up; *Neave* the plaintiff demanding the debt, he inſiſted he had paid the bond out of the perſonal aſſets and had none left to pay him; whereupon he brought this bill and the defendant inſiſted, that he being both heir and adminiſtrator had a liberty to pay the debt out of what aſſets he pleaſed; that he had not paid the bond out of the real aſſets nor ever intended ſo to do. But upon the whole matter the court declared the bond to be well paid out of the perſonal aſſets, and decreed the debt and coſts out of the perſonal aſſets. *Hil.* 1695. *Neave* and *Alderton.*

22. Upon a ſpecial report it was adjudged, that in relation to other debts, in point of priority of ſatisfaction, a duty debt ſhould take place before debts; on ſimple contract and bonds and next to judgments. 1 *Vern.* 143.

23. So where an adminiſtrator paid money on ſpecialties, with

(*a*) The recognizance not being inrolled, is imperfect; and although the court may permit the inrolment of it after the time is elapſed, yet it is done with caution, that it ſhall not prejudice any intervening purchaſer. (to this purpoſe ſee the caſe of *Fotbergil* and *Kendrick*, 2 *Vern.* 234.) and the ſtatute of frauds provides, that judgments ſhall not, by having relation to the firſt day of the term, bind purchaſers, nor affect the land, but from the time of ſigning them in the margin; but it is ſilent as to recognizances and pocket ſecurities, which are more dangerous to purchaſers, and therefore more reaſonable that this recognizance ſhould not bind but from the time of the inrolment: and it may fairly be preſumed, that the debt was otherwiſe ſatisfied or ſecured, when the recognizance was not inrolled. *per* Ld. Chan. *Cowper*, *Ibid.* 75', in S. C.— 1 *Will. Rep.* 334, S. C. and P. held accordingly.

without notice of money due by *(a)* decree, and had fully administered the assets; yet he was obliged to pay the money decreed. 2 *Vern.* 37.

(a) A court of equity cannot compel an executor to perform a decree made against the testator before a statute acknowledged by him; and a prohibition granted to the council of *York* accordingly. 1 *Rol. Abr.* 377. An obligation becoming due after the death of the testator, shall be satisfied before a decree in Chancery. *Styl.* 38. But the law has been since changed, and decrees are now held to be equal to judgment at law. *Vide* 2 *Vern.* 88. and *The Bank of England* and *Morrice*, *Eq. Ca. Abr.* Part 2. by which this point seems to be now fully settled.

(C) *What shall be a good Payment, to whom, and at what Time.*

1. IF *J. S.* a scrivener, lends the money of *A.* to *B.* and takes security by mortgage, in trust for *A.* and *A.* has the security always in his possession, and *B.* pays the money to the scrivener, who becomes insolvent, such payment will not discharge *B.* for he having paid the money without taking up his security, is an evidence that he trusted the scrivener more than *A.* Decreed on view of precedents. *Hen* and *Conisby*, 1 *Chan. Ca.* 93.

2. So if money is paid to one who usually received money for the obligee, yet if such receiver has not the custody of the bond, payment to him will not be good. *Gerrard* and *Baker*, *ibid.* 94.

* 3. A man intrusts a scrivener to put out his money, he takes bond for it, and afterwards delivered the bond to the obligee, but received the interest from time to time, and afterwards called in the principal; and the obligor paid the principal to the scrivener, and took a note from him to deliver up the bond (he having it not when the money was paid in); then the scrivener writes to the obligee to send him the bond, which he accordingly does, but takes the scrivener's note, either to deliver back the bond, or to pay the money; before the money paid the scrivener breaks, and the obligee for a little money gets back the bond from the scrivener's clerk, and puts it into suit; and this bill was brought by the obligor to be relieved, and have the bond delivered up; which was decreed accordingly, with costs; for the court held, that from the time the bond came into the scrivener's hands, he was trustee for the obligor (the money being paid); and it is plain the obligee trusted the scrivener, not only with putting out his money, but with the custody of his security. *Pas.* 1691. *Abbington* and *Orme.*

4. The interest-money of a mortgage being paid to a scrivener, who became insolvent; the question was, who should bear the loss. It was admitted, *first*, That if the scrivener be intrusted with the custody of the bond, he may receive either principal or interest: 2*dly*, That if the scrivener be intrusted with the mortgage-deed, but not the bond, he hath only an authority to receive the interest, but not the principal, because the giving up the deed is not sufficient to restore the estate; but there must be a reconveyance; whereas the giving up a bond is in law an extinguishment of the debt: 3*dly*, That though the scrivener has neither the custody of the mortgage nor bond, yet if the mortgagee agrees that the mortgagor shall pay the interest to the scrivener, the interest may be well paid to the scrivener, as long as the mortgagee lives: 4*thly*, That if his executor receives interest from the scrivener, which became due after the mortgagee's

death, he thereby renews the agreement, and the mortgagor ſhall not bear the loſs, if the ſcrivener breaks, which was the principal point in this caſe. Decreed at the Rolls, and affirmed by *Cowper* Ld. Chan. on a rehearing. 7 *Ann. Whitlock* and *Watham*, 1 *Salk.* 157.

Vide Title *Aſſignment and Privity* (A) *Pl.* 4.

5. If *A.* and *B.* being truſtees of money, for the ſeparate uſe of a Feme Covert, lend it to *C.* who gives bond to the truſtees, and the truſt is declared in the condition, and the bond is kept by the feme; and *B.* having received money for *C.* they ſettle an account, and *B.* gives *C.* a receipt for 100 *l.* as received for the uſe of the feme, and *B.* becomes inſolvent, *C.* ſhall not be diſcharged of this 100 *l.* the truſt being declared in the condition, and the feme having the bond in her cuſtody. Decreed *Hil.* 1705. *Baldwin* and *Billingſley*, 2 *Vern.* 539.

6. If there are two executors, and one of them is decreed not to receive any more of the teſtator's eſtate, and a creditor, by mortgage to the teſtator, being preſent at the pronouncing the decree, but not a party to the ſuit, pays money to the executor, againſt whom the decree was, he ſhall pay it over again. Decreed *Trin.* 34 *Car.* 2. *Harvey* and *Mountague*, 1 *Vern.* 57, 122, S. C.

7. If an obligor pay the money to the obligee after aſſignment of the bond, and notice thereof, ſuch payment will not diſcharge him. 2 *Vern.* 540.

8. If a Feme Mortgagee, on her marriage, ſettles the eſtate on herſelf for life, remainder to the iſſue of that marriage, and the mortgagor brings a bill to redeem, and ſhe omits ſetting forth the ſettlement in her anſwer, and the mortgagor has a decree to redeem, and he pays her the mortgage-money; and afterwards the iſſue of the mortgagee brings an ejectment on the ſettlement, and recovers the mortgaged premiſſes, the mortgagor ſhall be relieved, having paid his money purſuant to the decree, and having been in no fault; for if the iſſue was cheated, it was by his own mother. Decreed 1690. *Chapman* and *Duncumb*, *ibid.* 142.

* 9. The plaintiff was indebted to the defendant upon two notes, and the defendant obtained judgment at law againſt him for the money; and then deſiring the defendant's forbearance, he told him, that if he would procure one *Defoy* to give him his note for the money, he would accept of it, and acknowledge ſatisfaction on the judgment, and deliver up the plaintiff's notes; and being to go forthwith out of *England*, he left the plaintiff's notes with his agent here to be exchanged for *Defoy*'s, in caſe the plaintiff procured them, and the plaintiff accordingly procured two notes payable to the defendant, which he delivered to the defendant's agent, and took up his own notes; and the attorney at law ſtaid all further proceedings, but would not acknowledge ſatisfaction on the judgment, having no orders for it from his client; and before *Defoy* paid any of the money, he failed, and then the defendant proceeded at law on the judgment; whereupon the plaintiff brought this bill to be relieved, and ſuggeſted, that he had diſcounted the money with *Defoy*, and made him ſatisfaction; but he made no proof of any ſuch thing, and therefore at the hearing his bill was diſmiſſed by the Maſter of the Rolls; and this decree was affirmed by Ld. K. on appeal. *Hil.* 1700. *Grubarr* and *Gairand.*

10. If

10. If a mortgagee by will remits part of the mortgage-money, provided the reſt be paid within three years after his death, and the deviſee fails to pay the money, he ſhall loſe the benefit of the deviſe. 1 *Chan. Ca.* 52.

11. So if a creditor agrees with his debtor to take a ſum of money leſs than his debt, ſo that it be paid preciſely at ſuch a day, and he fails of payment, and afterwards brings his bill, ſuggeſting ſome equitable excuſes, why he did not preciſely pay at the day, and that he tendered the money within a day or two afterwards; yet his bill will be diſmiſſed; for *Cujus eſt dare ejus eſt diſponere.* 1 *Vern.* 210. But if the ſecurity was bettered, as by another's becoming bound with him, *quære & vide* 1 *Chan. Ca.* 110.

12. But if a deed of truſt is erected for payment of ſuch creditors as come in within a year, a creditor will not be excluded, though he doth not come in till after the year. 1 *Vern.* 260, 319, S. C. *Dunch verſus Kent.*

(D) *When Debts of a different Nature are due, and a general Payment is made, to which Debt ſhall it be applied.*

1. IF *A.* is indebted by ſecurity, carrying intereſt, and alſo on ſimple contract, and he pays money generally, it ſhall be taken to be paid towards diſcharge of the debt which carried intereſt; for it is natural to ſuppoſe, that a man would rather elect to pay off the money for which intereſt was to be paid, than the money due on account. *Mich.* 1681. *Heyward* and *Lomax*, 1 *Vern.* 24. But *quære*, *Vide* Accord' *Caſ. B. R. Temp. W.* 3. 559.

2. For if *A.* indebted by ſpecialty, and alſo on ſimple contract, pays ſeveral ſums, and enters them in his book on account of what was due by ſpecialty, this entry ſhall not be ſufficient to make the application; for although the rule of law is, that *Quicquid ſolvitur, ſolvitur ſecundum modum ſolventis*; *(a)* yet this rule is to be underſtood, when the perſon, at the time of payment, declares on what account he pays the money; but if the payment is general, the application is in the perſon receiving. *Per* Ld. Chan. *Hil.* 1707. *Manning* and *Weſterne*, 2 *Vern.* 606. *(a) Vid.* 2. *Eq. Abr.* 261. (G.) *Wentworth* and *Manning. S. P.* and perhaps *S. C.*

3. If *A.* is indebted to *B.* by bond, in which *J. S.* is bound as ſurety, and alſo by ſimple contract; and *A.* ſtates an account of both debts with *B.* and makes a bill of ſale for ſecuring the balance, which proves deficient; the bill of ſale ſhall be applied towards the diſcharge of both debts in proportion; and *per* Ld. Chan. ſolely for this reaſon, that both debts had been caſt into the ſtated account, and the bill of ſale made towards ſatisfaction of the whole debt. Decreed *Hil.* 1681. *Bevis* and *Roberts*, 1 *Vern.* 34.

4. If a creditor by judgment, and alſo by bond, receives 200 *l.* part, of the purchaſer of the eſtate of the debtor, but gives no notice that he would apply it to the bond-debt, it ſhall be applied towards ſatisfaction of the judgment, being part of the purchaſe-money. Decreed *Trin.* 1687. *Bret* and *Marſh*, *ibid.* 468.

(E) *What Conveyance or Diſpoſition ſhall be fraudulent as to Creditors.*

1. THE wife joined with her huſband in a mortgage, and levied a fine with intent to bar her dower; and in conſideration thereof the huſband agreed the wife ſhould have redemption of the mortgage; and the huſband afterwards mortgaged the eſtate twice more; the ſubſequent mortgagees brought their bill to ſet aſide the agreement as *(a)* fraudulent againſt them, which was decreed: But the wife had her dower ſecured to her. 1 *Vern.* 294.

(a) By the 13 *Eliz. c.* 5. All fraudulent conveyances of lands, &c. goods and chattels, to avoid the debt or duty of another, ſhall (as againſt the party only, &c. whoſe debt or duty is ſo endeavoured to be avoided) be utterly void, and every of the parties to ſuch fraudulent conveyance, &c. being privy thereunto and juſtifying the ſame, ſhall forfeit one year's value of the goods, &c. provided this act ſhall not extend to grants made *bona fide* and upon *good conſideration*, to perſons not privy to ſuch colluſion, or having no notice or knowledge thereof.

2. The father makes a voluntary ſettlement on truſtees, of truſt, to raiſe money to pay his debts therein mentioned, and portions for his younger children, reſerving 50 *l. per ann.* to himſelf for life, remainder to his ſon, *&c.* and the father continues in poſſeſſion, and twelve years afer contracts debts by bond: And *per Hutchins* Ld. Comm. the ſettlement is fraudulent as to the plaintiffs, who are bond-creditors, the truſtees having never entered; and a deed, though not fraudulent at firſt, may afterwards become ſo by being concealed, or not purſued; but the other two commiſſioners doubting, it was ſent to be tried at *(b)* law. *Paſc.* 1692. *Hungerford* and *Earle*, 2 *Vern.* 261.

2 *Freem.* 120, S. C.

(b) If *A.* makes a bill of ſale to *B.* a creditor, and afterwards to *C.* another creditor, and delivers poſſeſſion, at the time of ſale, to neither; after *C.* gets poſſeſſion of them, and *B.* takes them out of his poſſeſſion, *C.* cannot maintain treſpaſs, becauſe the firſt bill of ſale is fraudulent againſt creditors, and ſo is the ſecond; yet they both bind *A.*'s and *B.*'s is the elder title, and the naked poſſeſſion of *C.* ought not to prevail againſt the title of *B.* that is prior, where both are equally creditors, and poſſeſſion, at the time of the bill of ſale, is delivered over to neither. *Trin.* 1706. *Baker* and *Lloyd.* 1 *Holt.* C. J. But as to fraudulent conveyances and bills of ſale, ſee the following authorities which are the moſt remarkable caſes in the books on this ſubject; *Yelv.* 196. *Cro. Jac.* 1 *Brownl.* 111. 6 *Co.* 18. 3 *Co.* 80. *Moor* 638. 2 *Bulſt.* 226. 1 *Rol. Abr.* 779. *Palm.* 2 *Leon.* 223. *Co. Lit.* 3. *b. Cro. Eliz.* 810. 11 *Co.* 48. *Dyer* 351. 5 *Co.* 60. *Moor* 6 *Gilb. Uſes.* 306. 2 *Term. Rep.* 97, 507, 597.

3. If *A.* conveys lands to the uſe of himſelf for life, with power to mortgage ſuch part as he ſhall think fit, remainder to truſtees to ſell to pay all his debts, and afterwards becomes indebted by judgments, bonds and ſimple contracts; this conveyance is fraudulent, as againſt the judgment-creditors, they having no notice of the ſettlement; for he having reſerved a power to mortgage what part he pleaſed, it amounted, in effect, to a power of revocation, and therefore fraudulent, as againſt creditors by judgment. *Trin.* 1705. *Tarback* and *Marbury*, 2 *Vern.* 510.

4 *J. S.* by a bill of ſale made over his goods to a truſtee for the defendant, who lived with him as his wife, and was ſo reputed; he alſo purchaſed a leaſe of the houſe wherein he dwelt, in the name of truſtee, and declared the truſt thereof to himſelf for life, then in truſt for the defendant during the reſidue of the term; and the court held the bill of ſale to be fraudulent as to the plaintiffs, who were creditors; but as to declaration of the truſt of the term, that it was good, and not liable to his debts, the wife

term never being in him; and it being so settled on the purchase; and that he might have given the money to the defendant to have purchased the lease herself. *Hil.* 1704. *Fletcher* and *Lady Sidley*, 2 *Vern.* 490.

5. The plaintiff had brought his action against *M.* for lying with his wife; and 13 *Jan.* 1689. *M.* made a conveyance of his land to trustees, in trust, to pay his debts mentioned in a schedule annexed to the deed, and such other debts as he should appoint, within ten days in *Hilary* term following; the plaintiff recovered 3000*l.* damages against *M.* and brought this bill to be relieved against the deed, as fraudulent against him, and made to defeat him of his debt. *Per Cur'*, This deed is not fraudulent, either in law or equity, for such debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and tho' it were made with an intent to prefer his real creditors before this debt, when it came afterwards to be a debt; yet it was a debt founded *in Maleficio*, and therefore it was conscientious in him to prefer the other debts before it; but the plaintiff may come in upon the surplus after the debts mentioned in the schedule, or appointed within ten days, pursuant to it, are satisfied. *Mich.* 1699. *Lewkner* and *Freeman*.

Prec. in Chan. 105. S. C. *in totidem Verbis.* 2 *Freem.* 236. *Hil.* 1699. *Leukener* and *Freeman*, S. C. Held the deed was not fraudulent; the reporter says, the master of the rolls cited a case, where a man made a settlement for payment of his own proper debts in the first place, and to prefer them before, if not exclude

such debts, for which he was bound as a surety only; and that was held to be a fraudulent deed; only because he kept it in his custody, and the creditors had no notice of it. But here it doth not appear where the deed was kept, and so shall be presumed to be in trustees hands, and not in *M.*'s, there being no proof touching that matter; *and a deed shall not be presumed fraudulent, unless it appear so, or be so proved.* Ibid. 237.

*6. A man binds himself and his heirs in a bond, and dies, leaving a real estate to descend to his heir, and the heir having aliened the real estate, the obligee brought a bill against the heir and purchaser to be relieved, on the *(a)* statute against fraudulent devises; and Ld. Chan. relieved him. *Easter* 1702. *Bateman* and *Bateman*. Note; *It was objected, that the statute being introductive of a new law, the relief on it ought to have been at law.*

Vid. 2 *Bac. Abr.* 364. 2 *Atk.* 430.

(a) By the 3 & 4 *W. & M.* All wills concerning lands, or any rents, profits, terms, or charge out of the same, whereof the devisors shall be seised in fee simple, in possession, reversion, or remainder, shall be deemed to be fraudulent, and void against creditors upon bonds or other specialties, their executors, administrators, &c. and such creditors shall have their actions of debt against the heir at law, and the devisees, jointly, &c.

*7. Though by the statute against fraudulent devises, a man is prevented from defeating his creditors by his will; yet any settlement or disposition he shall make in his life-time of his lands, whether voluntary or not, will be good against bond-creditors, for that was not provided against by the statute, which only took care to secure such creditors against any imposition which might be supposed in a man's last sickness; but if he gave away his estate in his life-time, this prevented the descent of so much to the heir, and consequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so, when they are given away to a stranger. Decreed *Trin.* 1718. *Parslowe* and *Weedon*.

Mr. *Vernon* always grumbled at the determination of this case, and never forgave it the Lord *Macclesfield*, saying it was contrary to the constant practice of the court: *Per Talbot* C. *Hil.* 1734. in the case of *Jones* and *Marsh*, *Ca. in Eq. Temp. Talbot* 64.

CAP.

CAP. XXIII.

Customs of London and York.

(A) *What shall be deemed a Freeman of* London's *Estate, and subject to the Custom.*
(B) *What Disposition made by a Freeman of his Estate shall be good or void, being in Fraud of the Custom.*
(C) *Persons intitled to the Benefit of the Custom, and subject to it.*
(D) *Concerning the Custom with respect to the Children of a Freeman; and here of Advancement, bringing into Hotchpot, Survivorship and Forfeiture.*
(E) *Concerning the Widow of a Freeman, and what shall be a Bar of her customary Share.*
(F) *Concerning the Legatory or dead Man's Share, what shall go out of it, and how it shall be distributed.*
(G) *Concerning the Custom of* York.

(A) *What shall be deemed a Freeman of* London's *Estate, and subject to the Custom.*

1. IF a freeman of *London* has a mortgage in fee, this shall be counted part of his personal estate, and will be subject to the (a) custom. 1 *Chan. Ca.* 285. *per Cur'.*

(a) When this custom first began, the citizens of *London* had no regard at all to a real estate; for they did not suppose a freeman of *London* would purchase such estate, but would employ his whole fortune and stock in trade, and for the benefit of commerce; which is the reason that neither estates of inheritance nor freeholds in houses, lands, &c. are within the custom. *Mich.* 1710. *Clavell* and *Littlet arguendo.*

2. But a leaſe for years, waiting on the inheritance of a citizen, ſhall not be reckoned a chattel, to be divided among the children by the cuſtom; agreed by counſel, and admitted by the court. 2 *Chan. Ca.* 160.

3. A citizen and freeman of *London*, poſſeſſed of a leaſe worth 1500 *l.* bought the reverſion and inheritance thereof in the name of truſtees, for 150 *l.* and died; and whether this leaſe, being aſſets at law, ſhould be part of his perſonal eſtate, ſubject to the cuſtom of *London* (there being no declaration that it ſhould attend the inheritance) was the queſtion; and it was decreed, that though this leaſe would be aſſets at law to pay debts, yet it ſhould attend the inheritance, though there was no declaration of truſt that it ſhould do ſo, and not be liable to the cuſtom; *per Nottingham* Ld. Chan. and this decree was confirmed on a rehearing by *North* Ld. K. *Hil.* 1683. *Dowſe* and *Derivall*, 1 *Vern.* 104. The cuſtom of *London* ſhall not prevent the attendance of a term on the inheritance. *Ibid.* 2. *per Nottingham* Ld. Chan.

*4. On a marriage of *B.*'s daughter with *A.* a freeman of *London*, *B.* the father, ſettles a term for years in truſt, that *A.* the huſband, ſhould receive the rents and profits till ſuch time as *D.* and *E.* or the ſurvivor of them, ſhould otherwiſe appoint, and then ſuch perſon as they ſhould appoint; and for want of ſuch appointment, for ſuch perſons as the ſaid *A.* by will ſhould appoint; and for want of ſuch appointment, then in truſt for the executors and adminiſtrators of *A.* The truſtees having made no appointment, the queſtion was, whether this term ſhould go according to that appointment, or be looked on as part of *A.*'s perſonal eſtate, who was a freeman of *London*, and ſo go according to the cuſtom; and Ld. K. was of opinion, that it was not to be looked upon as part of *A.*'s perſonal eſtate, becauſe it was never in him, but was ſettled by his wife's father, and therefore not ſubject to the cuſtom. *Hil.* 1702. *Grice* and *Gooding*.

5. If a freeman of *London* is made both executor and reſiduary legatee, and he dies before he has made his election, whether he will take as executor or legatee; yet the legacy muſt be conſidered as ſuch, and will be ſubject to the cuſtom of *London*. 1 *Chan. Ca.* 310. *per* Ld. Chan.

6. A citizen of *London*, having been a great chymiſt, and ſpent great part of his eſtate in that ſtudy, had given to the defendant, who had married one of his daughters, a little before his death, ſeveral receipts for making of ſtrong-waters, which the plaintiff, who had married the other daughter, and who had only 400 *l.* portion given him, alledged were worth 500 *l. per ann.* certain profit; and to induce the court to think they were of value, he offered the defendant 500 *l.* for his intereſt in them, and prayed, that upon his bringing his 400 *l.* into hotchpot, the defendant might be obliged to account for them; but Ld. Chan. ſaid, That he would not ſo far countenance theſe receipts (which is only a piece of Quackery, and ſerves only to cheat the people) as to put a value on them in Chancery; and the plaintiff refuſing to bring his 400 *l.* into hotchpot, the bill was diſmiſſed. *Mich.* 1682. *Jenks* and *Holford*, 1 *Vern.* 62.

(B) *What Diſpoſition made by a Freeman of his Eſtate ſhall be good or void, being in fraud of the Cuſtom.*

1. IF a freeman of *London* is poſſeſſed of a term for years, and he voluntarily aſſigns it as a proviſion for his child, and dies; yet his wife ſhall have her *(a)* cuſtomary ſhare therein; ſo found by a jury on an iſſue directed out of Chancery, and tried before *Hale* C. J. *City* and *City*, 2 *Lev.* 130.

(a) Though the father cannot diſpoſe of the cuſtomary part from his children; yet he may by his will appoint, that if one dies before twenty-one, another ſhall have his part. 1 *Lev.* 227. But *quære*, & *vide* 1 *Chan. Ca.* 199. *cont'*.

2. If a freeman of *London* makes a deed of truſt of a term for years to the uſe of his will, and he by will declares it to *J. S.* this deed and declaration will be void, being againſt the cuſtom. Decreed 10 *Cur.* 1. *Nott* and *Smithies*, 1 *Chan. Rep.* 84.

3. A citizen of *London*, being poſſeſſed of a term for years, aſſigns the ſame in truſt for himſelf for life, paying 20 *l. per ann.* to his ſon by his firſt wife, remainder to his ſaid ſon during the reſidue of the term; and it was made a doubt, whether this aſſignment was good within the cuſtom of the city of *London*, ſo as to bind the other children; and it was referred to the recorder to certify. *Paſc.* 1689. *Clerk* and *Leatherland*, 2 *Vern.* 98.

4. A freeman of *London* having three baſtards by *T. J.* confeſſes a judgment to her in 1000 *l.* defeaſanced for payment of 500 *l.* in three months after his death; and it was held, that this judgment being voluntary, ſhould not prevail againſt debts by ſimple contract, nor againſt the widow of the freeman, but that ſhe muſt have her ſhare according to the cuſtom of the city, without any regard had to this judgment; but his debts being paid, the judgment will bind the legatory part. Decreed *Hil.* 1690. *Fairbeard* and *Baivers*, *ibid.* 202. *ante.* 143. *Ca.* 15. S. C.

5. A freeman of *London*, by deed in nature of a will (the words of which were, *I give and deviſe*, but it was ſealed and delivered) gave ſeveral goods to his children, but kept them in his poſſeſſion; and it was held *per cur'*, in favour of the widow, that if goods are abſolutely given away by a freeman in his life-time, this will ſtand good againſt the cuſtom; but if he has it in his power, as by keeping of the deed, *&c.* or if he retains the poſſeſſion of the goods, or any part of them, this will be a fraud upon the cuſtom. *Mich.* 1692. *Hall* and *Hall*, 2 *Vern.* 277. *vide ibid.* 612, *S. P.*

6. A freeman of *London* having one daughter, and three grandchildren by a ſon deceaſed, by deed aſſigns over ſeveral leaſes in truſt, to pay any ſum not exceeding 1000 *l.* as he ſhould appoint; and by deed and will he appoints 500 *l.* to his daughter, and the reſidue to his grandchildren; and it was held, that this was in fraud of the cuſtom. and void as to the moiety which the daughter was intitled to. Decreed *Trin.* 1712. *Turner* and *Jennings*, *ibid.* 685.

7. But

7. But if money be given by a freeman of *London* to be laid out in land, and ſettled on his eldeſt ſon for life, remainder to his firſt and other ſons in tail; this ſhall not be reckoned any part of the perſonal eſtate; neither is the ſon obliged to bring it into hotchpot, to intitle him to a ſhare of the perſonal eſtate. *Per* Ld. Chan. *Mich.* 1685. *Annand* and *Honeywood*, 1 *Vern.* 345.

2 *Chan. Ca.* 117, S. C. and S. P.

8. A freeman of *London*, who was a widower, and had ſeveral children, being poſſeſſed of a very conſiderable leaſehold eſtate, on a ſecond marriage conveys theſe leaſes, in conſideration of 2000 *l.* portion, in truſt for himſelf for life, remainder to his wife for life, in lieu and bar of all dower, cuſtomary eſtates, *&c.* remainder to the firſt ſon of that marriage, and ſo to every other ſon; and in the ſettlement there was an agreement, that the truſtees ſhould ſell theſe leaſes, and inveſt the money in the purchaſe of lands of inheritance, to be ſettled to the uſes aforeſaid; but the huſband dying before any purchaſe made, it was held, *firſt*, That the wife was barred from claiming any other part of the perſonal eſtate: *2dly*, That the children by the firſt venter could have no right to thoſe leaſes; neither would this ſettlement prevent the children of the ſecond marriage from coming in for a ſhare of the reſt of the perſonal eſtate; for by the agreement theſe leaſes are now to be conſidered in equity, as if a purchaſe had been actually made, and the freeman had paid the money out of his pocket. Decreed *Mich.* 1700. *Hancock* and *Hancock*.

Gilb Eq. Rep. 95, S. C. cited, ſays, The children by the firſt venter brought their bill for an account of the perſonal eſtate, and inſiſted it wholly belonged to them, and that the ſecond and her iſſue ought to be excluded from any ſhare thereof, by reaſon of the proviſion made for them; that it was decreed, that this compoſition with the wife bound her; but her children being infants, were left to make their election when they came of age, whether they would abide by that proviſion made for them by that ſettlement, or relinquiſhing that, come in for their cuſtomary ſhare only: And afterwards on a rehearing, what ſhould come of the cuſtomary part, it was held to fall into the huſband's ſhare; and in caſe no diſpoſition was made thereof by him, it muſt go according to the ſtatute of diſtributions.—*Vide* p. 157. Pl. 4 & 5.—2 *Vern.* 665, S. C.

(C) *Perſons intitled to the Benefit of the Cuſtom, and ſubject to it.*

1. IF an heir or co-heir has a real eſtate ſettled on him by his father, he ſhall notwithſtanding come in for his ſhare of the perſonal eſtate according to the cuſtom of *(a) London*, certified to be the cuſtom. *Hil.* 1683. *Civil* and *Rich*, 1 *Vern.* 216. 2 *Jon.* 204, S. P. *Per Cur.*

(a) In *London* there hath been a court of orphans time out of mind, and there hath been a cuſtom, that if any freeman or freewoman dies, leaving orphans under age, unmarried, that they have had the cuſtody of their body and goods, and that the executors and adminiſtrators have uſed to exhibit true inventories before them; and if there appeared to be any debt, to be bound to the chamberlain, to the uſe of the orphans, in a reaſonable ſum to make a good account thereof upon oath after they have received them; and if they refuſed, to commit them till they were bound; this is a good and reaſonable cuſtom; and if the Eccleſiaſtical Court will compel them to make an account there againſt this cuſtom, a prohibition lies. *Hob.* 247.

2. If a freeman of *London* leaves *London*, and reſides in the country, yet on his death his perſonal eſtate ſhall be *(b)* liable to the cuſtom. 2 *Vern.* 110.

(b) Shall be liable, though he did not inhabit or die in *London*. 1 *Rol. Rep.* 316. 1 *Sid.* 250. All the children of a freeman, though he dies, and they were born out of *London*, ſhall be orphans. 1 *Vent.* 180. 1 *Mod.* 80. If a legacy be given by one freeman to the children of another, it ſhall be ſubject to the cuſtom. *Hutt.* 30. If an orphan is taken out of the cuſtody of a perſon to whom the court of orphans have committed him, they may impriſon the offender till he produces the infant, or is delivered by courſe of law. 1 *Sid.* 250. *Keym.* 116, S. C. adjudged, 1 *Lev.* 162, S. C. adjudged. So if any one (though not a freeman) without the conſent of the Court of Aldermen, marry ſuch orphan under the age of twenty-one, though out of the city, they may fine him, and impriſon him for non payment thereof. But the cuſtom ſhould not extend to marriages out of the city, their power would be [illegible] 24 *Car.* 2. *The King* and *Harwood*, 1 *Vent.* 178. 1 *Lev.* 32, S. C. adjudged. [illegible] S. C.

Vide Northey and *Strange*, S. P. *Eq. Ca. Abr.* Part 2.

3. A citizen of *London* dies, leaving a widow, and no children, but has ſeveral grandchildren living at the time of his death; and the queſtion was, whether they were within the cuſtom of the city of *London*, or not; and Ld. Chan. taking time to conſider the caſe, and conſulting the Recorder and ſeveral of the aldermen, delivered his opinion, that grandchildren were not within the cuſtom of the city of *London*. *Paſc.* 1686. *Fowke* and *Hunt*, 1 *Vern.* 397.

Prec. in Chanc. 499, S. C. ſays it was ſo agreed by the counſel on both ſides.

4. But an after-born child ſhall come in with the reſt of the children for a cuſtomary ſhare of a freeman of *London*'s perſonal eſtate. Decreed *Trin.* 1718. *Walſam* and *Skinner*.

—*Gilb. Eq. Rep.* 153, S. C. *in totidem Verbis* with *Prec. in Chan.*

(D) *Concerning the Cuſtom with reſpect to the Children of a Freeman; and here of Advancement, bringing into Hotchpot, Survivorſhip, and Forfeiture.*

1. ANY proviſion made by the father, in his life-time, for his children, is an advancement within the cuſtom, unleſs it be declared by writing, that they are not ſufficiently advanced; and for ſome time it was held, that in ſuch writing there muſt be mention made, what ſum they received from their father, becauſe of bringing it into hotchpot. 1 *Vern.* 89. Per Cur': *But whether there be any difference in giving a portion before or after marriage, or whether preſents at chriſtenings or lyings-in are to be reckoned an advancement*, quære, & vide 1 Vern. 61.

2. By the cuſtom of the city of *London*, where a child is married with the father's conſent, and there is a portion given in marriage, ſuch child is debarred from claiming any benefit of the orphanage part, unleſs the father ſhall by writing under his hand and ſeal, not only declare, that ſuch child was not fully advanced, but likewiſe mention in certain, how much the portion given in marriage did amount unto, that ſo it may appear what ſum is to be brought into hotchpot. 1 *Vern.* 216. *But this matter ſeems to be well ſettled by the following caſe and certificate.*

1 *Ld. Raym.* 484, S. C.

3. Sir *Ralph Box*, a freeman of *London*, had two ſons and two daughters, both the daughters were married in his life-time; and upon the marriage of one of them with the plaintiff, Sir *Ralph* entered into articles to give 2000 *l.* with her for her portion; and there being an expectation that her grandmother would leave her ſomething conſiderable at her death, which the plaintiff's friends were not willing to rely on; Sir *Ralph* covenanted to pay the further ſum of 400 *l.* for what the grandmother ſhould leave her; the marriage took effect, and Sir *Ralph* paid the 2000 *l.* and 400 *l.* and the grandmother died, and left the plaintiff's wife nothing; and now Sir *Ralph* being dead, the plaintiff and his wife brought this bill, ſuggeſting that ſhe was not fully advanced, though Sir *Ralph* had declared by his will, that ſhe was, and therefore ought to have an account of his perſonal eſtate, and her portion ought to be made up to her a full cuſtomary part; the court deſired the Recorder of *London* to certify what the cuſtom of the city

city was in ſuch caſes, who certified, *(a)* &c. and Ld. Chan. ſaid, that the certificate being the proper trial in this caſe, and being againſt the defendant; for when the certainty of the advancement appears, the father's declaring or not declaring her fully advanced, does not avail; therefore an account muſt be taken of the eſtate, and the 2000*l.* muſt be made up her full cuſtomary part, and the 400*l.* paid for the grandmother's legacy muſt not be taken as any part, that being paid on a bargain only. Decreed *Trin.* 1699. *Chace.* and *Box.*

(a) To ——, may it pleaſe your lordſhip, whereas by an order of his Majeſty's High Court of Chancery of the 14th of *May* laſt, in a cauſe there depending between *James Chace* and *Elizabeth* his wife, plaintiffs, and *Sir Ralph Box*, Knt. defendant, the Lord Mayor and Aldermen are required to certify the cuſtom of *London* by the mouth of the Recorder, in the points following, *viz.* Whether if a citizen of the ſaid city hath, in his life time, advanced any of his daughters in marriage with a portion of money, and ſhall, by any writing under his hand and ſeal, declare ſuch daughter was by him fully advanced; whether ſuch daughter, by the cuſtom of the ſaid city, is not excluded from having or demanding any further, or other part of her father's cuſtomary eſtate, as an orphan of the ſaid city; or whether ſhe ſhall, after her father's deceaſe, have a ſhare of his cuſtomary eſtate, bringing what ſhe received on her marriage into hotchpot: *We*, the Lord Mayor and Aldermen of the ſaid city of *London*, having heard the ſaid parties, and their counſel learned in the law, do humbly certify your lordſhip, that by the laws and cuſtoms of the city, if any freeman's child, male or female, be married in the life-time of his or her father, by his conſent, and not fully advanced to his or her full part or portion of his or her father's perſonal or cuſtomary eſtate, as he ſhall be worth at the time of his deceaſe; then every ſuch freeman's child ſo married, as aforeſaid, ſhall be excluded and debarred from having any further part or portion of his or their ſaid father's perſonal or cuſtomary eſtate, to be had at the time of his deceaſe, except ſuch father by his laſt will and teſtament, or ſome other writing by him written, and ſigned with his name or mark, ſhall declare or expreſs the value of ſuch advancement; and then every ſuch child, after the deceaſe of his or her ſaid father, producing ſuch will or other writing, and bringing ſuch portion ſo had of his or her father, or the value thereof, into hotchpot, ſhall have as much as will make up the ſame a full child's part or portion of the cuſtomary eſtate his or her ſaid father had at the time of his deceaſe; *notwithſtanding* ſuch father ſhall, by any writing under his hand and ſeal, declare ſuch child was by him fully advanced. Dated, &c.

4. A freeman of *London* having advanced his daughter with a portion, and intending to exclude her from any further ſhare (on ſome diſpleaſure taken againſt her) made his will, and thereby recites, that he had advanced her with 300*l.* and upwards, gives her five ſhillings, and no more, and died; and after his death the ſaid daughter brought a bill to have the ſaid 300*l.* made up a moiety of his eſtate, (he having no other child, and the cuſtom not extending to grandchildren) and had a decree accordingly; for the words *and upwards*, are *certum in incerto*, and not to be regarded, though it was objected, it might be 100*l.* or 200*l.* or any other ſum above 300*l.* Decreed *Hil.* 1704. *Bright* and *Smith.*

2 *Freem.* 279. S. C. decreed, that the daughter ſhould come in for her ſhare, bringing the 300*l* in Hotchpot: this reporter ſays in a note, that it was ſuppoſed that the word *upwards* was inſerted purpoſely to make it uncertain, which made it look like a trick; but if he had taken notice, that he had advanced his daughter, and not ſaid what, ſhe had been barred. *Ibid.* 280.

5. A ſettlement of a real eſtate on a child is no advancement, nor to be brought into hotchpot. 1 *Chan. Ca.* 160. neither does a deviſe of a real eſtate bar the child of its cuſtomary ſhare of the perſonal eſtate. 2. *Vern.* 753.

Vide Cox and *Belitha, Eq. Ca. Abr.* Pt. 2.

6. If a freeman of *London* advances a child in part by a portion which is to be brought into Hotchpot, ſuch portion or advancement muſt be brought into the orphanage part only. *Per* Ld. Chan. *Mich.* 1685. *Beckford* and *Beckford*, 1 *Vern.* 345. 2 *Vern.* 281, S. C. decreed, *viz.* that the eſtate left by the teſtator ſhall be firſt divided into three parts, *viz.* the widow's third part, the orphanage part, and the legatory or teſtamentary part, and then what the children in part advanced had received, ſhall be brought into the orphanage part only, and not to increaſe the whole eſtate: And therefore,

7. If there be an only child in part advanced in the father's life-time, *ſuch child ſhall not bring her part into Hotchpot* *, there being

* *Vide Cleaver* and *Spurling, Eq. Ca. Abr.* Pt. 2. S. P.

being none in equal degree with her; agreed between *Fane* and *Bence*, 2 *Vern.* 234. *Ibid* 630, S. P. *Dean* and *Lord Delaware*: And though there be a widow, yet ſhe is to have her third excluſive, *Ibid.* 754, S. P. for if it were to be brought in, it muſt fall again into the child's part.

Gilb. Eq. Rep. 32, 33. *Loeffes* and *Lowen*, S. C. and P. *Prec. in Chan.* 370, 372, S. C. and P.

8. If a freeman of *London* dies, leaving two daughters and a wife, and one of the daughters dies, though after a diviſion and partition of the perſonal eſtate, yet the ſurviving ſiſter ſhall have the whole of the orphanage part. *Per* Ld. Chan. *Trin.* 1713. *Leoffes* and *Lewen.*

9. If a child intitled to an orphanage ſhare dies before twenty-one, and unmarried, her ſhare will ſurvive to the reſt of the children, though ſhe makes a will, and deviſes it away at ſeventeen years of age. *Per Cur'*, 2 *Vern.* 559.

Vide Prec. in Chan. 537.

10. But if a man marries an orphan, who dies under twenty-one, her orphanage part ſhall not ſurvive to the other children, but ſhall go to the huſband. *Fouke* and *Lewen*, 1 *Vern.* 88.

11. If a man marries a city orphan, and her portion is in the chamber of *London*, and he dies before her age of twenty-one, this ſhall not be looked upon as a *depoſitum* for the huſband, but as a *debitum* or *choſe in action*, which he not having taken out, or reduced into poſſeſſion, muſt ſurvive to the wife. *An. Pheaſant's* caſe, 2 *Vent.* 340. 1 *Chan. Ca.* 181, S. C.

12. If the daughter of a citizen of *London* marries in his life-time againſt his conſent, unleſs the father be reconciled to her before his death, ſhe ſhall not have her orphanage ſhare of his perſonal eſtate; and it would be unreaſonable to take the cuſtom to be otherwiſe. *Hil.* 1 & 2 *Jac.* 2. *Foden* and *Howlett*, 1 *Vern.* 354. *Per* Ld. Chan.

(E) *Concerning the Widow of a Freeman, and what ſhall be a Bar of her cuſtomary ſhare.*

1. IF a freeman of *London* dies without iſſue, his widow ſhall have her widow's chamber, and a moiety of the reſt of the perſonal eſtate; and as to the other moiety, ſhe may plead herſelf adminiſtratrix to her huſband, and a proviſo in the act of diſtributions, that it ſhould not prejudice the cuſtom of *London*, and the plea will be allowed. *Hil.* 1682. *Matthews* and *Newby*, 1 *Vern.* 133. *But* quære *as to this laſt point, for the proviſo in the act extends only to the cuſtomary ſhare; and therefore the dead man's ſhare muſt be divided according to the ſtatute of diſtributions. Vid. poſt.* 159. *Caſ.* 2.

2. A freeman of *London* having no children, made his will, and thereby deviſed a chattel-leaſe to one, and all his books to another, and as to all the reſt of his eſtate, conſiſting in money, goods, mortgages, and credits, he gave the yearly profits and benefit thereof to the plaintiff, his wife, for life, by quarterly payments; and directed his executors, out of his eſtate, to pay the plaintiff's funeral charges after her death, and deviſed to her the uſe of his plate, &c. during her life, and directed that his ſtock and eſtate in the hands of one *J. C.* ſhould remain there during his wife's life, and the product paid to her for her maintainence, and deviſed ſeveral particular legacies; and after the death of his wife,

deviſed

deviſed over the ſurplus and reſidue to his brother's children; on a bill brought by the widow it was decreed at the rolls, that by the cuſtom of *London* ſhe ſhould have her widow's chamber, and one entire moiety of the perſonal eſtate, after debts paid, as well of the leaſe and books which were ſpecifically deviſed away, as of all the reſt and reſidue of his eſtate, by the cuſtom of the city of *London*, and ſhould have the benefit of the other moiety for life, by the will; and decreed an account accordingly; which decree was confirmed upon an appeal to the lords commiſſioners. *Mich.* 1689. *Webb* and *Webb*, 2 *Vern.* 110.

3. *J. W.* a freeman of *London*, on a treaty of marriage with *M. P.* a widow, who had a conſiderable fortune and ſeveral children, agrees that he ſhould have only 600*l.* of her fortune, and the reſidue to be ſettled for her ſeparate uſe, and after her death, for the benefit of her children; and accordingly an indenture was prepared and executed before marriage, whereby ſhe, with his aſſent, aſſigns over her fortune to truſtees, in truſt, that ſhe ſhould receive the profits of it for her own ſeparate uſe during her life, and after her death, that the ſame ſhould go and be divided equally amongſt her children; and *J. W.* in conſideration of the intended marriage and marriage-portion of 600*l.* makes a ſettlement on her, and at the end of the deed covenants, that if the ſaid *M. P.* ſhould ſurvive him, then his executors ſhould pay and deliver to the ſaid *M. P.* 600*l.* out of his perſonaleſtate: The marriage takes effect, *J. W.* dies without iſſue; and it was inſiſted upon, that the widow was intitled to this 600*l.* in the firſt place, purſuant to the marriage-agreement, and to a full moiety of the perſonal eſtate, as his widow, by the cuſtom of *London*; but the maſter of the rolls held, that the agreement mentioning him a citizen of *London*, ſhews that the cuſtom might well be in view at that time, and that this compounding for 600 *l.* in all events, exempted her out of the reaſon of the cuſtom; and decreed accordingly. *Hil.* 1711. *Whithill* and *Phelps*, *vide* Letter (B) Caſe 7th, S. P.

Prec. in Chan. 335, S. C. and decree. *Gilb. Eq. Rep.* 81, S. C. *in totidem verbis* with *Prec. in Chan.* 10 *Mod.* 451, 462. 1 *P. Wms.* 634. 3 *P. Wms.* 15. 320. 2 *Vez.* 592. 1 *Atk.* 402. 2 *Atk.* 644. 3 *Atk.* 528.

* 4. A widower and a widow being about to intermarry, and having only perſonal eſtate, by articles made before marriage agreed, that in caſe the huſband ſurvived, he ſhould have 2000*l.* only out of his wife's perſonal eſtate, and the reſt to be at her diſpoſal, *&c.* and in caſe the wife ſurvived, then ſhe was to have 2000*l.* out of the huſband's perſonal eſtate, without ſaying *only*, or *no more*: The huſband, being a freeman of *London*, died, and his wife brought her bill for an account of his perſonal eſtate, over and above the 2000*l.* and to be let into her cuſtomary ſhare thereof; but it was decreed, that the equal conſtruction of theſe articles muſt be to exclude the wife from any further ſhare out of the eſtate; and though the words were not ſo full to exclude her; yet the intent of the articles appearing to be a mutual reciprocal agreement between them for ſettling each other's claim, ought not to be extended larger on one ſide than on the other; and therefore the wife muſt have only the 2000*l.* Decreed *Mich.* 1714. *Pott* and *Lee*.

Gilb. Eq. Rep. 95, S. C. cited in the following caſe by the name of *Pitt* and *Lee*, *in totidem Verbis.*

5. On a treaty of marriage between the defendant and her late huſband, *Edmund Waterſon*, deceaſed, indentures of leaſe and releaſe, by way of ſettlement, were executed; whereby in confirmation of the intended marriage, and 2000*l.* marriage-portion, lands

Gilb. Eq. Rep. 94, S. C. but the certificate and decree do not appear. *Vide* the caſe of *Babington* and *Greenwood*, *Eq. Ca. Abr.* Pt. 2. S. P.

lands to the value of 200*l. per ann.* were limited to the defendant for life, for her jointure, and in full of all dower and title of dower to any lands, tenements, or hereditaments, whereof or wherein her ſaid intended huſband was or ſhould be ſeiſed of any eſtate of inheritance during the coverture between them; and in the releaſe, *William Waterſon*, father of *Edmund*, covenanted, that in caſe *Edmund* ſurvived him, that then all his real and perſonal eſtate, whereof he ſhould die ſeiſed or poſſeſſed, ſhould deſcend and come to *Edmund*, his heirs, executors and adminiſtrators: The marriage takes effect, *William Waterſon* dies; whereby ſome real eſtate and a conſiderable perſonal eſtate came to *Edmund*; then *Edmund* makes his will, and having no iſſue, deviſes 500*l.* to his wife, and ſome other legacies, and deviſes the reſidue of his perſonal eſtate to be laid out in a purchaſe, to be ſettled on the plaintiffs, *Bonnells*, who were his nephews, and makes the plaintiff, *Atkins*, his executor, and dies; and the bill was brought againſt the widow for a diſcovery and account of the perſonal eſtate, and that it might be laid out in a purchaſe, and ſettled purſuant to the directions in the will. The widow inſiſted by her anſwer, that her huſband was a freeman of *London*, and that he dying without iſſue, ſhe, as his widow, was intitled to a moiety of his perſonal eſtate, as her cuſtomary ſhare; and whether ſhe were ſo intitled, or not, was the ſingle queſtion. For the plaintiffs it was urged, that ſhe was not, for that by this ſettlement ſhe was provided for already; and by the cuſtom of *London*, where the widow is *compounded* with, as they call it, ſhe cannot be let in to any other part of her huſband's perſonal eſtate; that this was founded on very good reaſon, that the wife might not depend for ſubſiſtence on the caſualties of trade and other contingencies, whereto the perſonal eſtate might be liable; and therefore, ſince ſhe had in all events ſecured herſelf of a proviſion, and taken out ſo much from the huſband's power of diſpoſing of, ſhe ought to reſt ſatisfied with that proviſion; that if this had not been intended in full of her cuſtomary part, there would have been negative words, or ſome proviſo in the ſettlement, that it ſhould not extend to exclude her of her cuſtomary ſhare; that the perſonal ſhare was under conſideration, as appears by the covenant concerning the diſpoſition of it, in caſe the huſband ſurvived his father; and therefore the proviſion being general, muſt be intended to be compleat, and to exclude her from any other; and on this ſide were cited ſeveral caſes, wherein a compoſition with the wife has been held a bar of her cuſtomary ſhare. On the other ſide it was argued, that ſhe ought not, by this ſettlement, to be excluded from her cuſtomary part; that if no ſettlement had been made, ſhe would, on her marriage, have been intitled to her dower at common law, out of the real eſtate, and to her cuſtomary ſhare out of the perſonal eſtate; that this jointure came only in lieu of dower of the real eſtate, and that by the act of parliament 27 *H.* 8. and therefore could be no recompence for her cuſtomary ſhare of the perſonal eſtate; that ſhe was intitled to one by the common law, and to the other by the cuſtom; and a recompence provided for one of them only, could be no recompence for the other, which ſhe claimed by a diſtinct independent title; that there being no negative words in the deed, made it the ſtronger; that

they

they did not intend to exclude her of her cuſtomary ſhare; and therefore it was tied up barely in bar of her dower and title of dower; and ſuppoſe by the ſettlement there had been a proviſion for her out of the perſonal eſtate only, and that had been expreſſed to be in full of her ſhare of the perſonal eſtate, would that have excluded her from her dower of the real eſtate? no more ought this jointure, which goes only in bar of her dower of the real eſtate, be conſtrued to exclude her from her cuſtomary ſhare of the perſonal eſtate; and the entries in the city books muſt be intended where the compoſition (as they call it) was only out of the perſonal eſtate; and as to the caſes which have been in this court, they are all to this purpoſe. Ld. Chan. ſaid, He thought the reaſon of the caſe very ſtrong for the defendant, but that this point might be ſettled in a proper way, deſired to have the cuſtom certified, whether ſuch jointure before marriage being limited to be only in bar of her dower, ſhould preclude her likewiſe of her cuſtomary ſhare; afterwards the cuſtom was certified, to be *That where a freeman, before marriage, makes a ſettlement on his intended wife, and the ſame is thereby declared to be in full lieu and bar of her ſhare of his perſonal eſtate, that ſhe is thereby barred to claim any of his perſonal eſtate after his death; but if the ſame were expreſſed to be in bar only of dower, or thirds of lands, tenements and hereditaments, they ſaid the ſame had never been in controverſy in this court, nor had they any cuſtom concerning it.* It was afterwards decreed to be no bar of the cuſtomary ſhare. *Paſc.* 2 *Geo.* 1. *Atkins* and *Waterſon.*

6. In this caſe the cuſtom of *London* was certified to be, that if a woman, before her marriage with a freeman, accepts a ſettlement out of his perſonal eſtate, without any notice taken of the cuſtom, this bars her of any cuſtomary ſhare of his perſonal eſtate after his death, if ſhe ſurvives: But note, this means only, that ſhe cannot ſingly and merely, by virtue of the cuſtom, claim any other part; not that ſhe is thereby debarred from the benefit of any gift or deviſe he thinks fit to make her. *Trin.* 1727. *Lewen* and *Lewen.*

Select Ca. in Ch. 14. *May* 4, 1725, S. C. but no decree. 3 *Will Rep.* 15, S. C. *Mich.* 1727. determined on the certificate, that the wife was in this caſe debarred of her cuſtomary part.—The reaſon of the cuſtom in the preſent caſe ſeems to be, for that the wife does not here truſt to the cuſtom for her proviſion. By *King* C. *Ibid.* 17.

(F) *Concerning the legatory or dead Man's Share, what ſhall go out of it, and how it ſhall be diſtributed.*

1. A Citizen of *London* deviſed 700 *l.* for mourning; and the queſtion was, whether it ſhould come out of the whole eſtate, or only out of the legatory part; for it was inſiſted, that if there had been no directions by the will, or if the will had only directed, that the expences of the funeral ſhall not exceed ſuch a ſum, then the deduction muſt have been out of the whole eſtate: But *per cur'*, mourning deviſed by the will muſt come out of the legatory part, and not leſſen the orphanage or cuſtomary ſhare. *Mich.* 1691. *Deakins* and *Buckley*, 2 *Vern.* 240.

2. If a freeman of *London* dies inteſtate, leaving a wife and children, one third of his perſonal eſtate, and the widow's chamber, muſt go to the wife, and one other third to the children, and the

the dead man's third muſt go according to the ſtatute of diſtributions, *viz.* two thirds to the children, and the other third to the wife, and that this dead man's third was not at all under the controul of the cuſtom; agreed on as an undoubted rule. *Trin.* 1718. *Walſam* and *Skinner*, 2 *Vern.* 559. S. P.

3. If a freeman of *London* deviſes legacies more than the legatory ſhare come to, the legatees ſhall abate in proportion; and if a legacy be given to a child, though this ſhall go out of the legatory part, and cannot go in part of orphanage; yet if the legatory part is not ſufficient, the legatee muſt abate in proportion. *Vide* 2 *Vern.* 754. *Ibid.* 111.

4. A citizen of *London* being poſſeſſed of a perſonal eſtate to the value of 18,000 *l.* and having made a competent jointure to his wife on his marriage, it was agreed, that he might diſpoſe of two thirds of his perſonal eſtate by his will, *viz.* (a) one third part, which would have belonged to his wife, had he not made a ſettlement on his marriage in lieu thereof, by which means her cuſtomary part comes to be at his diſpoſal; and one other third part, which is the legatory part, which every citizen may diſpoſe of by his will; and having two ſons and two daughters, he makes his will, and by it deviſes two thirds of his whole eſtate to his daughters, and one third to his ſons; hereupon the chamber of *London* would have diſtributed his eſtate in this manner; *firſt*, To make an equal diviſion of the cuſtomary part, *viz.* of 6000 *l.* amongſt all the four children, which was 1500 *l.* a-piece, and then allot two thirds of the reſidue to the daughters, and one third to the ſons; ſo that by this diviſion each daughter ſhould have only 5500 *l.* and each brother ſhould have 3500 *l.* But Ld. Chan. declared, that the intent of the teſtator did to him plainly appear to be, that his daughters ſhould have two entire thirds of his whole eſtate, which is 6000 *l.* a-piece; and it was decreed accordingly. *Paſc.* 1681. *Love* and ———, 1 *Vern.* 6.

(a) *Qy.* if it has not been ſince held, that where the wife is compounded with, the whole eſtate ſhall be diſtributed as if there had been no wife, and the benefit of it to accrue to the orphanage and not the legatory part, and in ſome books ſaid that they ſhall divide the wife's part equally between the legatory and orphanage parts.

*5. In this caſe it was held, that where a freeman of *London* made his will, and deviſed legacies to his children more than their orphanage part would amount unto, without taking any notice whatſoever of the cuſtom, that theſe legacies ſhall be a ſatisfaction of their orphanage ſhares, to which they were intitled by the cuſtom in the nature of a debt, and that the legacies ſhall not come out of the teſtamentary or dead man's part, becauſe it is held in this court, that they ſhall not take both by the will and the cuſtom too; but where ſuch legacies are leſs than their orphanage ſhares, whether they ſhall be *pro tanto* in ſatisfaction, he was in great doubt, and ſent it to the city to certify; though he ſeemed rather to think they ſhould, in that caſe, take both, eſpecially if none of the deviſes in the will were thereby diſappointed. *Trin.* 1729. at the Rolls, *Nicholls* and *Nicholls*.

(G) *Concerning the Cuſtoms of* York.

1. IF a freeman of *London* dies in the province of *York*, ſeiſed and poſſeſſed of a real and perſonal eſtate, the cuſtom of the city of *London* for the diſtribution of his perſonal eſtate ſhall prevail,

prevail, and controul the cuſtom of the province of *York*. 2 *Vern.* 48. held clearly *per cur'*.

2. So if a freeman of *London* dies in *York*, his heir ſhall come in for a ſhare of the perſonal eſtate, though by the cuſtom of *York* he is debarred thereof; for the cuſtom of *London* which follows the perſon, ſhall be preferred to that of *York*, which is only local. *Mich.* 1688. *Cholmely* and *Cholmely*, *ibid.* 82. *per cur'*.

3. If a man within the province of *York* dies inteſtate, leaving a wife and no child, the wife ſhall have one moiety of the perſonal eſtate by the cuſtom, and the other moiety being without the cuſtom, ſhall be diſtributed according to the Act of Diſtributions. Decreed *Trin.* 1687. *Stapleton* and *Sherrard*, 1 *Vern.* 465, 134, 305, 432, S. C.

4. A man who lived in the province of *York* died inteſtate, having advanced all his children in his life-time; and it was held, that the perſonal eſtate which he died poſſeſſed of ſhould be ſettled according to the act for ſettling inteſtates eſtates. *Mich.* 1683. *Goodwin* and *Ramſden*, 1 *Vern.* 200. *vide* 2 *Vern.* 263. where a perſon who was an inhabitant of the province of *York* died inteſtate, having before his marriage made a ſettlement on his wife in bar of her cuſtomary ſhare, and leaving children; the queſtion was, how diſtribution ſhould be made; but there is no reſolution.

5. The inteſtate being an inhabitant in the province of *York*, left iſſue a ſon and a daughter only, and no widow; the daughter had a portion given her in marriage in lieu and full ſatisfaction of what ſhe might claim by the cuſtom of the province of *York*; the ſon was alſo advanced by a ſettlement of lands; the queſtion was, how the eſtate ſhould be diſtributed. For the heir it was inſiſted, that now the cuſtom of the province of *York* is to be quite laid out of the caſe, and the ſame diſtribution made of the eſtate, as of any other inteſtate's eſtate, and by conſequence the daughter to bring her portion into hotchpot, but the heir to have a full ſhare, without regard to what lands had been ſettled upon him: But *per cur'*, the daughter muſt not bring back her portion into hotchpot, for that came in lieu of her cuſtomary part, and was the price the father thought fit to give her for the ſame. *Trin.* 1692. *Gudgeon* and *Ramſden*, 2 *Vern.* 274.

6. An inhabitant of *York* having on his marriage ſettled his real eſtate on himſelf for life, remainder as to part on his wife for a jointure, remainder of the whole to his firſt and other ſons in tail, remainder to his own right heirs; the queſtion was, whether the ſon was thereby excluded by the cuſtom of the province of *York*, from having any ſhare of his father's perſonal eſtate; which point being directed to be tried on an iſſue at law; and it being found that he was thereby debarred, the ſame was decreed accordingly. *Trin.* 1700. *Conſtable* and *Conſtable*, *ibid.* 375.

CAP. XXIV.

Decree.

(A) *Concerning the Drawing up and Inrolling of Decrees.*
(B) *Who are bound by the Decree.*
(C) *Concerning Error in the Decree.*
(D) *Concerning the Performance and Execution of a Decree.*

(A) *Concerning the Drawing up and Inrolling of Decrees.*

1. IN the drawing up a decree, it is not ſufficient for the regiſter to recite the bill and anſwer, and then add, that upon the reading of the proofs, and hearing what was alledged on either ſide, it was decreed ſo and ſo; but the facts which were proved, and allowed by the court as proved, muſt be particularly mentioned in the decree; otherwiſe if a bill of review be brought, thoſe facts ſhall be taken as not proved; for elſe a decree could not be reverſed by a bill of review. 1 *Vern.* 214. 2 *Chan. Ca.* 161, S. P.

2. A decree being pronounced in *Michaelmas* term, and the defendant dying ſoon after, on a motion to have it inrolled, it was held by Ld. Chan. to be a thing often done; and that it was like a judgment at law, which, if pronounced before, may be entered after the party's death; and the decree was inrolled accordingly. 2 *Chan. Ca.* 227. *Nel. Chan. Rep.* 169, S. P. 3 *Chan. Rep.* 73, S. P.

3. So where a former decree of diſmiſſion being pleaded in bar to a ſecond bill, it was objected, that the diſmiſſion and decree could not be pleaded in bar, becauſe the decree was not ſigned and inrolled; and if the defendant would have it, that it was a ſuit ſtill in being, then the plea was a plea in abatement only: But *per cur'*, either that ſuit was for the ſame matter as the preſent, or not; if not, you ought to have moved to have had the

he plea referred; but if it is, then that ſuit is either depending or determined, and either way is pleadable. *Hil.* 1684. *Pritman* and *Pritman*, 1 *Vern.* 310.

4. But if an adminiſtrator obtains a decree, that he, his executors oradminiſtrators, may redeem a mortgage, and he dies inteſtatebefore inrolment of the decree, ſuch decree ſhall not afterwards be inrolled for the benefit of his adminiſtrator, for the firſt adminiſtrator's title is gone. 2 *Chan. Ca.* 248.

(B) *Who are bound by the Decree.*

1. ALL original parties to the ſuit, and likewiſe all thoſe who come in *pendente lite*, and are made parties thereto by proceſs, are bound by the decree. 1 *Chan. Ca.* 3, 153.

2. If there are two executors and one of them by decree is prohibited to receive any more money, or meddle farther with the teſtator's effects, and a mortgagor to the teſtator, who was preſent at the hearing and pronouncing the decree, afterwards pays the mortgage-money to the executor who had the decree againſt him, he muſt pay it over again. *Harvey* and *Montague*, 1 *Vern.* 57, 122, S. C. *But for this* vide *Title* Notice, *and what ſhall be a* Lis pendens.

3. An agreement by ſome tenants of a manor to incloſe or ſtint a common, will be decreed in equity, and ſuch decree will bind two or three humourſome tenants who oppoſe it. 1 *Chan. Ca.* 48. 2 *Vern.* 103. S. P.

* 4. So where a bill was brought by ſome few tenants of *Greyſtock* manor againſt the lord, to ſettle the cuſtoms of the manor as to fines upon deaths and alienations; and an iſſue was directed to be tried at law, and found, that upon the death of the lord or tenant, there was due an uncertain fine, but not exceeding a twenty-penny fine, that is, twenty years old rent; and upon alienation of the tenant, a fine altogether uncertain and arbitrary; and it was inſiſted upon, that there being but ſome of the tenants parties to this bill, the reſt would not be bound by this trial: But Ld. K. held they would; and he ſaid he remembered the caſe of *Nether Wierſdale*, between Lord *Gerard* and ſome few tenants, and Lord *Nottingham*'s caſe in the dutchy, concerning the cuſtoms of *Daintree* Manor, for grinding and baking at the lord's mill and bake-houſe, and ſaid in theſe and a hundred others, all were bound, though only a few tenants parties; elſe, where there are ſuch numbers, no right could be done, if all muſt be parties; for there would be perpetual abatements; and it is no maintenance for all the tenants to contribute, for it is the caſe of all; and in the Exchequer and Dutchy it would certainly be ſo, and no difference when it is here; and he cited Sir *William Boothby*'s caſe in the Dutchy laſt *Michaelmas* term, where a bill concerning the cuſtom of grinding at the lord's mill was amended, and made to be on behalf of the plaintiffs and all the reſt of the tenants; and as to the objection, that the courts of Exchequer and Dutchy are courts of Revenue, and go by other rules than ordinary courts of equity, he ſaid that was of no weight, and held, that all muſt be bound here as well as there. *Mich.* 1701. *Brown* and *Howard.*

5. The plaintiff, being vicar of the pariſh of *Wirkſworth* in *Derbyſhire*, brought a *Subpœna* in the nature of a *Scire Facias*, againſt the defendants, to inforce the performance of a decree made 5 *Car.* 1. by which (amongſt other things) it was decreed, that all the miners within the ſaid pariſh, as well for the time being, as to come, ſhould pay the *tenth diſh* of lead ore cleanſed, *&c.* to the vicar of the ſaid pariſh for the time being, for tithes, *&c.* The defendants appeared to the *Scire Facias*, and ſet forth, that they claimed not in privity under any of the parties to that decree, and that ſome of them were ſeiſed of mines not then found out or opened, and that there had not been any performance or execution of the decree, and other matters in avoidance. The court held, that the decree extends to all miners within the pariſh, for the time being, or to come; ſo the defendants are within the letter, and expreſsly bound by the decree, and as long as the decree ſtands in force muſt obey. *Mich.* 1690. *Brown* and *Booth*, 2 *Vern.* 184.

6. If a deviſee obtains a decree to hold and enjoy the lands againſt the heir, who it was ſuppoſed had ſuppreſſed the will, and pending this ſuit a third perſon gets an aſſignment of a mortgage made by the teſtator, and then purchaſes the equity of redemption of the heir, having notice that there was ſuch a will, the purchaſer ſhall not be admitted to diſpute the juſtice of the decree, nor to try at law, whether the will was not cancelled by the teſtator. *Ibid.* 216. *Finch verſus Newnham.*

7 Ca. Morrett & al. verſus Weſtern.

7. But if a mortgagee, after ten years ſuit, four reports, and two trials at law, obtains a decree to foreclose, and an account is taken, *&c.* yet ſuch decree, *&c.* will not hinder a ſubſequent incumbrancer from redeeming the firſt mortgagee, neither ſhall he be concluded by the account taken in the firſt ſuit. *Ibid.* 663.

(C) *Concerning Error in the Decree.*

1. MATTERS aſſigned for error in a decree, muſt appear in the decree itſelf; for being inrolled, it is ſuch a record as muſt be tried by itſelf; but if a fact be miſtaken at the hearing and decretal order, that may be rectified upon a rehearing. *Chan. Ca.* 54. vide *Bills of Review and Reverſal*, Title *Bill.*

2. If a feme ſole exhibits a bill, and during the proceedings marries, and no notice is taken of it, but the cauſe proceeds, and there is a decree for the defendant; this will not be ſufficient cauſe to reverſe the decree, being no error appearing in the decree, but a matter which ſhould have been pleaded in abatement and of which the defendant alone might have taken advantage. 1 *Chan. Rep.* 231.

3. So if a mortgagor has a decree againſt the mortgagee to have a redemption, and pending a reference the ſuit abates by the death of one of the parties, defendants; but the account goes on, and the maſter is attended by the executor of the party dying, and makes his report, which is confirmed and decreed; this after twenty years ſhall not be ſufficient error, ſo as to intitle the deviſee of the mortgagor to a new account. 30 *Car.* 2. *Slingſby* and *Hale*, 1 *Chan. Ca.* 122.

* 4. Sir *George Downing* brought an appeal in the houſe of lords om a decree made in the court of chancery, by conſent, ſuggeſt-g, that though the regiſter in drawing up the order had drawn as a decree by conſent (and the minutes were ſo too); yet he ever did conſent to ſuch decree, nor his counſel neither; or if ney did, it was without his authority, and made affidavit of it; ut the appeal was diſmiſſed. *Hil.* 1699. *Downing* and *Cage.*

* 5. *John Grice*, by will, deviſes his real eſtate to his wife for fe, and after to *Thomas* his ſon, for ninety-nine years, if he ſhould long live, charged with the payment of 500*l.* a-piece to *John* nd *Thomas*, the two eldeſt ſons of his ſon *Thomas*, at their age of wenty-one years, and dies; afterwards *John* the grandſon dies in 1694, an infant, and inteſtate; after, in 1698, *Thomas* the father lies, without taking adminiſtration to *John* his ſon; and this bill was brought to have an account and diſtribution of the perſonal eſtate of *John Grice* the grandfather, *Thomas* the father, and *John* he ſon; and on hearing the cauſe the court had decreed the 500*l.* egacy, deviſed to *John* the grandſon, to be diſtributed among his other, brother and ſiſters, equally; and a bill of review being rought to reverſe this decree, the firſt error aſſigned was, that on he death of *John* the grandſon, in the life of *Thomas* his father, is 500*l.* legacy veſted in his father by the ſtatute of diſtributions, hough he took not adminiſtration to him, and therefore ought ot to have been diſtributed as the perſonal eſtate of *John* the randſon, but as the perſonal eſtate of *Thomas* the father, and hen the mother would be intitled to a third of it; and it was ad-itted that it ought to have been ſo; but it was inſiſted, that this rror did not appear in the body of the decree, as drawn up; for hough it was laid in the bill, that the grandſon died in 1694, and he father in 1698; and that it is confeſſed in the anſwer, they ed about the times in the bill; yet the defendants being infants, eir admiſſion is not ſufficient, unleſs proved; and it ſhall be ſup-oſed it was not proved, becauſe if it had, the court could not ake ſuch a decree, and the proofs cannot now be referred to. n the other ſide it was ſaid, taking the facts to be, as it appears the decree, as drawn up and inrolled, it is a plain error, and it uſt be ſo taken now; and the queſtion is not at preſent, whe-er an infant's admiſſion be good, or not. Ld. K. held it an error ppearing in the body of the decree; ſo the decree was opened. *in.* 1706. *Grice* and *Goodwin.*

As this 500*l.* for the benefit of *John* the grandſon iſſued out of land, and he died before his age of 21, (the time appointed for the charge to operate) quære why it ſhould not ſink into the land for the benefit of thoſe who were to enjoy the real eſtate, according to *Pawlet* and *Pawlet*, in 2 *Vent.* 366, 7. 1 *Vern.* 204, 324. 2 *Chan. Rep.* 286. 2 *Freem.* 93. *Poſt.* 267. *Ca.* 1. &c.

Unleſs perhaps, as here this 500*l* was chargeable only (as it ſeems) on the eſtate of *Thomas* the ſon, which, as being but a term of 99 years could not enjoy the privilege allowed in the above caſe to the inheritance,

t may make the portion (or legacy) diſtributable. But *quære*, if (allowing it to be but a acy iſſuing out of a perſonal eſtate) as the caſe is here ſtated, it veſts in any manner until *John*'s of 21. As it is not a deviſe to *John* chargeable on that term, and payable at the age of 21, is mentioned to be "charged with the payment of the 500*l.* to the children at their ages of " The difference of the wording of a legacy in theſe two manners is very plain (i. e. out a perſonal eſtate; *vid. Salk.* 415.) in the former caſe it veſts and is "*debitum in præſenti*, *endum in futuro*," in the latter, neither "*debitum* nor *ſolvendum*" until the completion of the e prefixed, ſo that, as the caſe is here ſtated, whether the deviſe be out of the whole eſtate inheritance, or only out of the term, *quære*, how the diſtribution to the next of kin of *John* grandſon, or the intereſt ſurviving to the father as adminiſtrator, &c. could take place t. (as it ſeems to me) either to *Pawlett* and *Pawlett* or to *Salk.* 415. &c.?

6. There having been a decree made for a very liberal allow-ce for the maintenance of an infant out of a truſt eſtate, and not cording to the truſt; upon a rehearing it was endeavoured to aſide the decree: But *per Cur'* where an infant recovers by decree

decree of the court, the court may, by the approbation of the infant's relations, allot him a maintenance, though no provision in the truſt for that purpoſe; and this founded on natural equity; and though in this caſe the decree went beyond natural equity, yet a decree being made in it, we will not reverſe it, though poſſibly we would not have made the decree. *Trin.* 1691. *Engleſield* and *Engleſield*, 2 *Vern.* 236.

(D) *Concerning the Performance and Execution of a Decree.*

1. THE Lord Chancellor for the time being will inforce the execution of decrees, though made by a prior Lord Chancellor; and though they are alledged to be unreaſonable, yet will aſſiſt with the utmoſt proceſs of the court, till they come regularly before him to be reverſed. 29 *Car.* 2. *Laurence* and *Berney*, 2 *Chan. Rep.* 127.

2. If by decree mortgage-money is to be paid at a certain time, yet in caſe of inevitable neceſſity the court may inlarge the time, though the decree be ſigned and inrolled. 1 *Chan. Ca.* 64.

3. But where the court had decreed, that either the defendant ſhould pay a ſum of money by a time therein for that purpoſe limited, or that in default thereof, that the plaintiff ſhould hold and enjoy the lands charged therewith; and a writ of execution of the decree had iſſued, and an attachment for non-performance thereof; and upon the return of the attachment, the defendant moved he might appear and be examined; and it was inſiſted he ought to be admitted thereto, for that he might ſhew that the proceſs iſſued not regularly, or that he had paid the money, or had a releaſe, *&c.* But the maſter of the rolls ordered the proceſs to go on, and would not admit the defendant to appear to be examined, unleſs he would give ſecurity to perform the decree. *Mich.* 1688. *Roper* and *Roper*, 2 *Vern.* 91.

* 4. The late Lord *Allington*'s eſtate was decreed to be ſold for payment of his debts and legacies, and that all parties intereſted ſhould join in the ſale; and accordingly the eſtate (being about 2000*l. per ann.*) was ſold to *J. S.* and conveyances executed in which there was a covenant for farther aſſurance; afterwards *J. S.* ſold away 1600*l. per ann.* of the eſtate to another perſon, and was conſtrained to deliver all the deeds to him, ſo that he had not left to make out any title to the 400*l. per ann.* that remained unſold; and therefore moved the court, that the parties to the conveyance to him might be ordered to execute a duplicate of the conveyance to be kept by him, they refuſing to do ſo on the laſt motion; Ld. K. ſaid, he looked upon it to be within the covenant for further aſſurance; and ordered that a duplicate ſhould be executed, but that it ſhould be indorſed on it, that it was only a duplicate; but the matter being moved again by the other ſide, the order was diſcharged; for that the decree being once executed, the court had no more to do in it. *Mich.* 1700. *Napper* v. *Lord Allington.*

That a decree is equal to a judgment, and to be paid accordingly in a courſe of adminiſtration, vide *title* Creditors and Debtor. *that the benefit of it ſurvives to the wife,* vide *title* Baron and Feme.

C A

CAP. XXV.

Deeds, and other Writings.

(A) *Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.*
(B) *Of ſuppreſſing and cancelling Deeds aud Writings, and the Conſequence thereof.*
(C) *Deeds and other Inſtruments entered into by Fraud, &c. in what Caſes to be relieved againſt.*
(D) *Defect in a voluntary Deed, in what Caſes aided in Equity.*

(A) *Who is obliged to produce them, to whom, and upon what Terms, and how they are to be kept.*

1. THE plaintiff was a remainder-man in tail in a voluntary ſettlement, and the bill was for a diſcovery of the deed; but it appearing to the court, that the intail was diſcontinued, the court would not relieve the plaintiff. *Hil.* 1688. *Kelly* and *Berry*, 2 *Vern.* 35. vide *Bills of Diſcovery*, Title *Bill.*

2. So where a bill was exhibited to diſcover an ancient deed of intail, alledged to be in the defendant's hands, and the defendant pleaded a conveyance made to himſelf of the eſtate in queſtion; and that, if there was any ſuch intail, the ſame was diſcontinued; and the court allowed the plea, and ſaid, they would not aid the iſſue in tail againſt a diſcontinuance, though by a voluntary conveyance. *Paſc.* 1688. *Bunce* and *Phillips*, 2 *Vern.* 50. Where affidavit muſt be made, that the party who prays a diſcovery of a deed, *&c.* has it not his poſſeſſion, *vide* Title *Affidavit*, Letter (A).

3. If an heir at law brings a bill for deeds and writings againſt the widow of his anceſtor, he muſt eſtabliſh her jointure, though it was made after the marriage, and not purſuant to any marriage-articles

articles, but purely voluntary. 1 *Vern.* 479, 480. *per Curiam, vide* 2 *Chan. Ca.* 4.

4. *A.* brought a bill againſt one who was aſſignee of a leaſe, and charged, that the defendant knew that the leaſe was expired, and that the ſame did appear by writings in his cuſtody. The defendant pleaded, that he was purchaſer of the leaſe, and that at the time of the purchaſe he was informed, that there were fifty-ſeven years to come in the leaſe, and therefore gave after the rate of nineteen years purchaſe for it; and the plea was allowed. 2 *Vern.* 255.

5. A bill was exhibited for a diſcovery, whether in a mortgage made by *A.* to *B.* which had been aſſigned to the defendant, there was not ſome truſt declared for the benefit of the plaintiff. The defendant by anſwer denied there was any truſt declared for the plaintiff; and the anſwer being replied to, the queſtion at the hearing was, whether the defendant ſhould be obliged to produce the deed; and Ld. K. ſaid, He would not oblige him; for by this method all purchaſers might be blown up. But the reporter adds a *Quære tamen.* 2 Vern. 463. *For this* vide *how far purchaſers without notice are favoured*, Title *Purchaſe*.

6. If there be a deed of ſettlement, under which two perſons claim, the court will *(a)* order it to be brought into court for its ſafer cuſtody, and both parties to uſe it as they have occaſion, and take copies of it, if they pleaſe. 2 *Chan. Ca.* 42.

(a) If a man ſeiſed of lands in fee hath divers charters, deeds, and evidences, and maketh a feoffment in fee, either without a warranty, or with warranty only againſt him and his heirs, the purchaſer ſhall have all the charters, deeds, and evidences, as incident to the lands *& ratione Terræ*, to the end he may the better defend the land himſelf, having no warranty to recover in value; for the evidences are as it were the ſinews of the land, and the feoffor not being bound to warranty, hath no uſe of them; but if the feoffor be bound to warranty, ſo that he is bound to render in value, then is the defence of the title at his peril; and therefore the feoffee in that caſe ſhall have no deeds that comprehend warranty, whereof the feoffor may take advantage; alſo he ſhall have ſuch charters as may ſerve him to deraign the warranty paramount; alſo he ſhall have all deeds and evidences which are material for the maintenance of the title of the land; but other evidences which concern the poſſeſſion, and not the title of the land, the feoffee ſhall have them. *Co. Lit.* 6. *a.* 1 *Co.* 1, 2.

7. *A.* on the marriage of his ſon, ſettled ſeveral lands in this manner, *viz.* as to part, to the uſe of himſelf for life, and after to the uſe of his ſon for life, then to his firſt and other ſons in tail, and for want of ſuch iſſue, to the uſe of the plaintiff, who was his brother, and his heirs; and as to the other part of the lands, to the uſe of the ſon for life, and after to the uſe of the wife for her jointure, then to the firſt and other ſons in tail; and for want of ſuch iſſue, to the plaintiff and his heirs; the ſon and wife died without iſſue in the life-time of *A.* and after their deaths *A.* got the ſettlement, and cut it in pieces; but the counter-part was intire, and in the hands of *A.* and the bill was brought to diſcover it, and to have it preferred; and the counter-part being confeſſed in the anſwer, the plaintiff obtained an order at the Rolls to have it brought into court; and a motion was made to have that order diſcharged, for that the remainder to the plaintiff was merely voluntary, and therefore he ought not to have any aid from a court of equity; but the court would not diſcharge the order, but made the deed be brought into court, there to remain, and thereby hinder *A.* from ſelling the eſtate from the plaintiff. *Trin.* 1691. *Brookbank* and *Brookbank*.

(B) *Of ſuppreſſing and cancelling Deeds and Writings, and the Conſequence thereof.*

1. *A.* Suppreſſed a marriage-ſettlement, by which a remainder in tail male was limited to the plaintiff's father; and all the prior eſtates being ſpent; upon proof made that the ſettlement came to the defendant's hand, and that he had confeſſed it in anſwer to a former bill, though now he denied it; the Maſter of the Rolls decreed the plaintiff ſhould hold and enjoy the eſtate, and this decree was confirmed by Ld. K. *Trin.* 1700. *Eyton* and *Eyton*, 2 *Vern.* 380. *Prec. in Chan.* 116, S. C. *Vide Dalſton* and *Coatſworth*, *Eq. Ca. Abr.* Pt. 2. *pag.* 287. *Caſ.* 3. 18 *Will. Rep.* 731, S. C. 733. 2 *P. Wms.* 748. 1 *Vern.* 235, 389, 505. 2 *Vern.* 233.

2. So where a perſon confeſſed, that he in a paſſion had burnt his marriage-articles; but it being made appear, that he produced them at the execution of a commiſſion ſubſequent in time to the day on which he pretended to have burnt them, he was committed to the *Fleet*, until he ſhould produce them; and although he afterwards made oath he had them not, and could not produce them, and that it was inſiſted for him, that although the burning of the articles was a great miſdemeanor, yet a man was not to ſuffer perpetual impriſonment, becauſe he could not do what was impoſſible for him to do; yet he could not be diſcharged until he had conſented to admit the articles were to the effect in the bill. *Trin.* 1706. *Sampſon* and *Ramſey*, 2 *Vern.* 561. *vide* 1 *Chan. Ca.* 292, 293, S. P.

3. If *A.* on his marriage with *B.* ſettles lands on her for a jointure, which were ſubject to an intail, and *C.* the brother of *A.* is privy to the intail, and ingroſſes the jointure-deed, and has the deed of intail in his cuſtody, and owns that he cancelled it, being under an apprehenſion that *A.* would dock the intail, and *A.* deviſes the inheritance to *J. S.* and dies without iſſue, though *C.* recovers in ejectment on the deed of intail; yet equity will decree the widow her jointure; but *J. S.* being a voluntary deviſee, can have no relief. *Mich.* 1691. *Rawe* and *Pole*, 2 *Vern.* 239. decreed, and affirmed in the Houſe of Lords. *Vide* Title *Notice.* *Prec. in Chan.* 35. *Rawe* and *Potts*, S. C. *Mich.* 1691.

(C) *Deeds, and other Inſtruments entered into by Fraud, &c. in what Caſes to be * relieved againſt.*

* For this *vide* Title *Agreements.*

1. *A.* For 300 *l.* granted to the defendant *B.* a rent-charge of 300 *l. per Ann.* out of lands in *Ireland* of 1000 *l. per Ann.* to hold to *B.* and his heirs, to commence from the firſt *Michaelmas* or *Lady-Day*, after the death of *A.* without iſſue male, with a proviſo, if the ſaid *A.* had any iſſue male, who ſhould attain the age of twenty-one years, the grant ſhould be void; *A.* died without iſſue; and on a bill to be relieved againſt this rent-charge, the court decreed a reconveyance or leaſe thereof on payment of the 300 *l.* and intereſt; it appearing in the cauſe by proof, that *A.* was young and neceſſitous, and had lived an idle diſſolute life, and that the debaucheries, in which *B.* was often a companion with him, would ſoon end his days; that he made

made this bargain without the advice of any friends or counſel of his own; and that he was utterly incapable of getting children, as appeared by the oaths of his ſurgeons. *Paſc.* 1684. *The Earl of Ardglaſſe* and *Muſchamp*, 1 *Vern.* 237.

Prec. in Chan. 206, S. C. accordingly. 2 *P. Wms.* 204.

2. But where *A.* had an inn in *Newcaſtle* deſcended to him, which was let at 64 *l. per Ann.* but ſubject to a ſmall mortgage, and *A.* being very poor, was inveigled to ſell it for 80 *l.* and afterwards brought a bill to be relieved, but was diſmiſſed: Ld. Chan. declaring, that though the bargain was not a fair one, yet as it was not attended with ſtrong badges of fraud, there could be no relief againſt it. *Mich.* 1702. *Wood* and *Fenwick.*

3. If a bond be entered into by force and terror, but ſo as not to make it *Dureſs*, the court may relieve againſt it, at leaſt not ſuffer it to be carried into execution in equity. 2 *Vern.* 497. *per Cur'.*

4. A man poſſeſſed of a leaſe for three lives of a rectory, deviſed the rectory by his laſt will; but that being void, it came to his three daughters, as coheirs and ſpecial occupants: There being a ſuit in Chancery, the huſband of one of the daughters, fearing to be in law, and being made to believe that he ſhould be forced to pay the coſts, releaſed the arrears that ſhould be coming to him for his ſhare of the rectory to the other ſiſters, who were to bear the charge of the ſuit; and his ſhare of the arrears amounting to 1000 *l.* the releaſe was ſet aſide, it being a miſapprehenſion in him. *Hil.* 1681. *Gee* and *Spencer*, 1 *Vern.* 32. *vide Ibid.* 20. where it is declared by Ld. Chan. to be the conſtant rule in equity, to avoid *(a)* a releaſe, where there is *Suppreſſio Veri*, or *Suggeſtio Falſi (b)*.

(a) A. had a judgment of 6000 *l.* againſt *B. B.* gave *A.* a legacy of 5 *l.* and died; *A.* on receipt of this 5 *l.* gave the executor of *B.* a releaſe in this manner: *I acknowledge to have received of* C. 5 l. *left me as a legacy by* B. *and do releaſe to him all demands which I againſt him, as executor of* B. *can have, for any matter whatſoever*; and it was adjudged that the generality of the words, *All Demands*, ſhould be reſtrained by the particular occaſion mentioned in the former part thereof, *viz.* the receipt of the 5 *l.* legacy, and ſhould not be a diſcharge of the judgment. *Paſc.* 1 *W.* & *M Knight* and *Cole*, 1 *Lev.* 101. adjudged.. *(b) Vide Broderick* and *Broderick*, *Eq. Ca. Abr.* Part 2.

(D) *Defect in a voluntary Deed, in what Caſe aided in Equity.*

1. *A.* Having two nephews, who were his heirs at law, by conveyance executed in his life-time, ſettled all the lands to the uſe of himſelf for life, remainder to his iſſue, if he ſhould happen to have any, remainder to his nephews; but in the enumeration of the particulars of the lands, a miſtake was made; but the conveyance being merely voluntary, the court refuſed to amend it, but left the lands to deſcend equally between them. *Hil.* 1681. *Lee* and *Henley & al'*, 1 *Vern.* 37, 38.

2. But if a man makes a voluntary ſettlement as a proviſion for his younger children, and for their maintenance, ſuch voluntary conveyance ſhall be ſupplied and made good in equity. 1 *Vern.* 40. *vide* 2 *Vern.* 475. That if there are two voluntary deeds or conveyances, the firſt ſhall prevail; and *vide* Title *Agreements*, Letter (C).

CAP.

CAP. XXVI.

Deviſes.

(A) *Of Deviſes, by whom and to whom.*
(B) *Of what Eſtate or Intereſt in the Deviſor may be diſpoſe.*
(C) *What Words paſs a Fee in a Will.*
(D) *What Words paſs an Eſtate-Tail, and for Life.*
(E) *Of executory Deviſes of Lands of Inheritance; and here of Contingent Remainders and Croſs Remainders, as far as they relate to this Place.*
(F) *Of executory Deviſes of Leaſes for Years; and here of the Limitation of the Truſt of a Term, as far as it relates to and agrees with the Deviſe thereof.*
(G) *Of Terms for Years and incertain Intereſts by Deviſe.*
(H) *Of Deviſes by Implication.*
(I) *Of Deviſes of Lands for Payment of Debts.*
(K) *Of Deviſes or Things perſonal, as Goods, Chattels, &c. by what Deſcription, and to whom good.*
(L) *Where a deviſe ſhall be in Satisfaction of a thing due.*
(M) *Of void Deviſes.*

1*ſt*, By deviſing what the Law already gives, or what the Policy of the Law will not admit.
2*dly*, By uncertainty in the Deſcription of the Thing deviſed.
3*dly*, By uncertainty in the Deſcription of the Perſon to take.
4*thly*, By the Deviſee of Lands dying in the Life-time of the Deviſor.

What Circumſtances are neceſſary by the 32 & 34 H. 8. and 29 Car. 2. *What ſhall be a Revocation and a new Publication*, vide *Title* Will.

(A) *Of Deviſes, by whom and to whom.*

1. A Wife whoſe huſband is baniſhed for his life by Act of Parliament, may *(a)* make a will, and in every thing act as a Feme Sole, as if the huſband was dead. *Trin.* 1689. *Counteſs of Portland* and *Prodgers*, 2 *Vern.* 104. *and the legatees*

(a) By 34 & 35 *H.* 8. it is declared in expreſs words, that a deviſe of any manors, lands, &c. by a Feme Covert, infant, ideot, or *Non compos*, is not good; that ſuch only, who have a ſound and diſpoſing memory, can deviſe, *vide* 6 *Co.* 23. a. *Cro.*

Jac. 497. and that it is not ſufficient that they be able to anſwer to familiar and uſual queſtions. If a man makes a will in his ſickneſs by the over importunity of his wife, to the end he may be quiet, this ſhall be ſaid to be a will made by reſtraint, and ſhall not be good. *Styl.* 427.

under the Lady Sandys's *will, whoſe huſband was ſo baniſhed, were decreed their legacies.*

2. A Feme Covert executrix cannot deviſe any of the goods, which ſhe hath as executrix, without the aſſent of the huſband, or his *(b)* agreement after. 1 *Rol. Abr.* 608.

(b) The huſband may bind himſelf by covenant or bond to permit his wife by will to diſpoſe of legacies, &c. and this will be ſuch an appointment as the huſband will be bound to perform. *Cro. Eliz.* 27. *Cro. Car.* 219, 376, 597. But it does not operate as a will, neither ought it to be proved in the Spiritual Court. 1 *Mod.* 211, 212. For the property paſſes from him to her legatee, and it is his gift. *Ibid.* 211. *per Curiam.* If he once aſſents, he cannot after diſſent; and where he is bound by agreement to let her make a will, his conſent ſhall be implied till the contrary appears; and what ſhall be a ſufficient evidence to an aſſent, *vide* 2 *Mod.* 172, 173. What religious perſons were diſabled from making a will, *vide Rol. Abr.* 608.

3. If a Feme Covert makes and publiſhes her will, and deviſes land by it, and her huſband dies, and then ſhe dies, the deviſe is void, becauſe the conſummation is founded upon the making and publiſhing, which are void acts. *Plow.* 344.

4. So if one, being under the age of twenty-one years, makes his will, and thereby deviſes his lands, and after attains the age of twenty-one years, and dies without making any new publication thereof, this deviſe is *(c)* void. *Mich.* 15 *Car.* 2. *Herbert* and *Forbale*, 1 *Sid.* 162. agreed *per Curiam*, upon a trial at bar.

(c) For this *vide And.* 182. *Dyer* 143. *Raym.* 84.

5. But an infant male at the *(d)* age of fifteen, or female at twelve, if proved to be of diſcretion, may make a will of their perſonal eſtate, and it ſhall be good; agreed by counſel, and admitted by the court. 2 *Vern.* 469.

(d) Some books mention the age of ſeventeen, others that an infant may make his teſtament, and conſtitute his executor for his goods and chattels at eighteen. *Co. Lit.* But as the common law hath appointed no time, it therefore depends wholly on the Spiritual Court. 2 *Mod.* 315. *per Curiam*; and it was ſaid, that they ſometimes allowed wills made by perſons of fourteen years of age; but however it being a matter within their juriſdiction, the courts of law will not intermeddle. *Ibid.* 2 *Jones* 210.

6. Tenant in tail to him and the heirs of his body, with the reverſion expectant in fee, cannot deviſe the land in fee to another, though he dies without iſſue. 31 *Aſſ.* 3. *(e)* adjudged. *Quære Rationem.*

(e) Becauſe at Common Law it was only a poſſibility, and not grantable or deviſeable; but whether ſuch a reverſion could be deviſed by parol within the cuſtom, *vide Styl.* 409, 410. *Dubitatur*, and there ſaid, that the Statute of *Weſtm.* 2. helped not the cuſtom.

7. Tenant in tail may deviſe lands to a charity, and ſuch deviſe ſhall be good, though there was neither fine levied, nor recovery ſuffered of the lands. *Duke's Char. Uſes* 110. 2 *Vern.* 453. S. P. decreed.

8. If there be two jointenants of lands, and one of them deviſes that which belongs to him, and dies, this is a void deviſe, and the deviſee takes nothing, becauſe the deviſe does not take effect till after the death of the deviſor; and then the ſurviving jointenant takes the whole by a prior title, *viz.* from the firſt feoffment; but in this caſe, if the deviſor ſurvives the other jointenant, then the deviſe is good for the whole, becauſe he being the ſurviving jointenant has the whole by ſurvivorſhip, and then the words of the

the will are ſufficient to carry the whole eſtate; beſides at the time of making the will, though he was not ſole tenant of the land, yet he was ſeiſed *per moy & per tout*; and it is impoſſible to fix upon any particular part which he meant to deviſe, becauſe he could not then call one part of the land more his own than another; and the moſt genuine conſtruction ſeems to give the whole land, ſince he was ſeiſed *per tout* of it at the time of the deviſe. *Lit.* Sect. 287. *Perkins*, Sect. 500.

* 9. A wife may be a deviſee, though not a grantee to the huſband; for as the grant had been void, becauſe the huſband and wife are but one perſon in law, ſo the deviſe is good, becauſe it does not take effect till after the death of the huſband, and then they are no more one perſon. *Co. Litt.* 112. 1 *Rol. Abr.* 610.

10. A deviſe to the principal, fellows, and ſcholars of *Jeſus College* in *Oxford*, and their ſucceſſors, for maintenance of a ſcholar, is good by the ſtatute of charitable uſes, though ſuch deviſe had been mortmain by the ſtatute of wills. *Hob.* 136. *Flood's* caſe. *Vide* title *Charity.*

11. A man might have deviſed to an infant *in ventre ſa mere*, though the deviſor died before the infant was born; for he was *in eſſe* in ſome reſpect, and the freehold ſhall be in the heir in the mean time: *(a) Dubitatur*, 11 *H.* 6. 13.

(a) Whether a deviſe to an infant *in ventre ſa mere per verba in præſenti* be good, has been much doubted, becauſe it is not to take effect at the time of the death of the deviſor; and ſince by the deviſe he is to take immediately after the death of the deviſor, the freehold cannot be in abeyance by the act of parties; but as the better opinion ſeems to be that ſuch a deviſe is good, it will be ſufficient barely to mention the authorities *pro* and *con.* as *Dyer* 303. 2 *Mod.* 9. 1 *Lev.* 135. *Moor* 177. Pl. 312. 220. *Raym.* 163. 1 *Keb.* 851. 2 *Bulſt.* 273. 1 *Rol. Rep.* 110, 137. 2 *Rol. Rep.* 335. *Raym.* 83. *Carter* 5, 87. 2 *Mod.* 292. And by *Finch* Ld. K. the doubt ariſes upon the ſtatute of wills, which enacts, that it may be lawful to deviſe to any perſon or perſons, &c. but that at common law without queſtion it was good. 2 *Mod.* 9. But a man cannot ſurrender a copyhold to an infant *in ventre ſa mere.* 1 *Rol. Rep.* 109, 137, 254. 2 *Bulſt.* 272.

12. A deviſe to an infant *in ventre ſa mere*, when he is born, is undoubtedly good, and the freehold ſhall deſcend in the mean time. 1 *Lev.* 135. 1 *Rol. Abr.* 609.

13. So is a deviſe to an infant *in ventre ſa mere*, with a new publication of the will after his birth. *Cro. Eliz.* 423.

14. So if lands be deviſed to *A.* for life, the remainder to a poſthumous child, this is a good contingent remainder, becauſe there is a perſon in being to take the particular eſtate; and if the contingent remainder veſts during the continuance of the particular eſtate, or *eo inſtante* that it determines, it is ſufficient. *Moor* 637. *vide* 3 *Lev.* 408. 4 *Mod.* 259, 282. the caſe of *Reve* and *Long*; and *vide* 10 & 11. *W.* 3. *cap.* 16. whereby proviſion is made for preſerving remainders for the benefit of poſthumous children.

15. If lands are deviſed to two men, and the child with which the deviſor's child is *enſeint*, the child ſhall take by the deviſe, but whether jointly or in common, *quære. Moor* 177.

16. A baſtard may be a deviſee of land, but a monk cannot. *Dyer* 323.

(B) *Of what (a) Eſtate or Intereſt in the Deviſor may he diſpoſe.*

(a) By the common law no lands or tenements were deviſeable by any laſt will or teſtament, neither could they be transferred from one to another, but by ſolemn livery and ſeiſin, matter of record, or ſufficient writing. *Co. Lit.* 111. *b.* The reaſon of this is owing to the nature of the old feuds and tenures; for if this were permitted, the lord would be diſappointed, not only of the profits of ward, marriage, and relief; but likewiſe it would be in the power of his tenant, by deviſing to a ſtranger, to put on him a perſon, who had neither ability of mind, or ſtrength of body; though the one was requiſite to aſſiſt him in his courts, and the other to defend his perſon in the field. (b) If a ſtranger diſſeiſes the deviſor, if he dies before re-entry, the deviſe is void, 39 *H.* 6. 18. *b.* but if he re-enters, the deviſe ſhall be good, for he was ſeiſed *ab initio.* 1 *Salk.* 238.

1. IF the father deviſes lands to his youngeſt ſon, and the eldeſt ſon knowing thereof enters into the land, and diſſeiſes the father, and ſo continues till the death of the father, by which the will is *(b)* void; yet becauſe it was made void by deceit and covin, it ſhall be made good in chancery; *Per* Ld. Chan. in *Roſſwell* and *Emry*'s caſe, 1 *Rol. Abr.* 378.

(c) If a man deviſe lands in which he has nothing, and after purchaſes them, ſuch a deviſe is void, not being within the ſtatute of wills, for he is not a perſon having. *Plow.* 348. So where a man deviſed to his wife all ſuch ſums of money, lands, tenements, and eſtate whatſoever, whereof at the time of his deceaſe he ſhould be poſſeſſed; and after the making of the will, he purchaſed lands of the cuſtom of Gavelkind, and died without making any publication; and it was held, that theſe purchaſed lands did not paſs, for they were not *ſua* at the time of the making of the will; and the conſtant form of pleading is, that the teſtator was ſeiſed, and that being ſo ſeiſed, &c. which at leaſt is an evidence of the law; and there is no difference as to lands deviſeable by cuſtom or by ſtatute; but ſuch deviſe of things perſonal is good, though the teſtator had them not at the time of making his will, becauſe they go to the executor, and paſs not by the will, but by the aſſent of the executor, to whom the will is only directory; adjudged *Mich.* 6 *Ann. in B. R.* on a writ of error out of the *C. B.* and confirmed alſo on a writ of error in the houſe of lords, between *Bunter* and *Cooke.* 1 *Salk.* 237, 238.

2. If *A.* articles for the purchaſe of lands; but before any conveyance executed, he deviſes all his lands to be ſold for the payment of his debts and legacies; theſe lands will paſs, although he was not ſeiſed at the *(c)* time of the will, and though there was no new publication. So if a man deviſes all his lands for payment of his debts, and afterwards purchaſes land, equity will decree a ſale of the purchaſed lands, although there were no precedent articles. *Trin.* 35 *Car.* 2. *Prideux* and *Gibbon*, 2 *Chan. Ca.* 144. S. C. cited *Lucas's Rep.* 529. *Mich.* 10. *Geo.* 1. *in Canc.*

Vide Eq. Ca. Abr. Part 2. *Woodier* and *Greenhill*, S. P.

3. If *A.* purchaſes copyhold lands, and dies before admittance, having firſt deviſed all his copyholds to *T. S.* the copyhold lands contracted for will paſs by the will; or in any caſe, if there are articles for a purchaſe, and the purchaſer makes his will, and dies before any conveyance executed, yet the lands ſhall paſs in equity. *Trin.* 15 *Car. Davie* and *Beadſham*, 1 *Chan. Ca.* 39.

Prec. in Chan. 320. S. C.— *Gilb. Eq. Rep.* 77, S. C. *in ætidem Verbis* with *Prec. in Chan. Vide Lucas's Rep.* 528.

4. *A.* employs *B.* to article for the purchaſe of lands, which *B.* did, and the articles were made in *April*, but the poſſeſſion was not to be delivered till the *Michaelmas* following; *A.* before *Michaelmas*, or a conveyance executed, but after payment of the purchaſe-money, deviſed by ſufficient words to *J. S.* and afterwards *A.* takes a conveyance of the lands ſo articled for, to him and his heirs, and died; and it was held, and affirmed upon a rehearing, that the land paſſed by the will, and that an equitable intereſt is as well deviſeable as a legal eſtate. *Hil.* 1711. *Greenhil* and *Greenhil (d)*, 2 *Vern.* 679. The reporter adds a *quære, Whether*

(d) 2 *Will. Rep.* 631. S. C. *Brown's Rep.* 227, 481. cited by the maſter of the rolls to have been ſo determined; but he took a difference where the purchaſe was before the will made, and where after; for in the laſt caſe teſtator had no equitable intereſt in the land, and ſo having no title, could deviſe nothing. *Vide* the caſe of *Pitt* and *Langford*, *Eq. Ca. Abr.* Part 2.

Whether the teſtator after the date of the will, having taken a conveyance to himſelf and his heirs, it did not amount to a revocation.

5. On a treaty of marriage, articles were entered into, whereby the ſum of 700 *l.* being the wife's portion, and 700 *l.* more added to it on the part of the huſband, in all 1400 *l.* was agreed to be laid out in the purchaſe of lands, to be ſettled on the huſband for life, remainder to the wife for life, remainder to truſtees to ſupport contingent remainders, *&c.* The marriage takes effect, the huſband dies without iſſue, and before any purchaſe made purſuant to the articles, having firſt deviſed all his perſonal eſtate to the defendant, who was his wife, and all his real eſtate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix, but took no manner of notice of the 1400 *l.* On a bill brought by the plaintiffs to have this 1400 *l.* as they would have the land, if the purchaſe had been made purſuant to the articles; for the wife took more by the deviſe, than ſhe would be intitled to under the ſettlement, had it been made; and therefore it was, that if it were to be conſidered as lands, ſhe could not have both, the deviſe of the perſonal eſtate being more than an equivalent, and therefore a ſatisfaction. And it was held by Ld. Chan. that as this caſe is, if a purchaſe had been made, even after the making this will, though at law ſuch lands would not paſs, yet in this court there could be no queſtion, but the plaintiffs would have the benefit thereof by the relation to the articles; and though no purchaſe was made, yet by the agreement the 1400 *l.* is to be looked upon in court of equity as a real eſtate, and as ſuch muſt go to the plaintiffs; and decreed accordingly *per Harcourt*, and affirmed by Lord *Cowper*. *Paſc.* 1715. *Lingen* and *Souray*.

Lingen and *Souray*, S. C. accordingly. *Prec. in Chan.* 400.—*Gilb. Eq. Rep.* 91, S. C. *in totidem Verbis* with *Prec. in Chan.* 1 *Will. Rep.* 172, S. C. and decree. 10 *Mod.* 39. 528. 2 *Eq. Abr.* 553. *pl.* 7. Another point in S. C. 2 *Bacon's* Abridgment. 52. S. C. *Gilb. Hiſt. Chanc.* 326. S. C. *Vid.* this caſe cited in 3 *Will. Rep.* 221.

6. A man ſeiſed in fee deviſed his lands in truſt, to ſell part for payment of his debts, and till his debts were paid, to pay 100 *l. per ann.* to his natural daughter *M.* and after the debts paid 300 *l.* for her life; and if ſhe have children, to convey ſucceſſively to thoſe children; but if ſhe dies without iſſue, then to convey to the eldeſt ſon and heir of *J. C.* his nephew, and the heirs of his eldeſt ſon; but if he claim any thing during the life of *M.* then both father and ſon to be excluded from having any thing out of his eſtate. The eldeſt ſon of *J. C.* was *A.* who had two ſiſters, *B.* and *T.* *A.* died leaving iſſue *J.* who in the life of *M.* deviſed the lands in queſtion to *J. S.* and died without iſſue; and after the death of *M.* without iſſue, the truſtee conveyed to the ſiſters of *A.* and their heirs; and the queſtion being between the ſiſters and the deviſee of *J.* it was decreed by the Lord Keeper, *Treby* Chief Juſtice, and Baron *Powel*, that this being but a mere poſſibility during the life of *M.* the deviſe was void, and the lands well conveyed to the ſiſters *B.* and *T.* *Trin.* 7 *W.* 3. *Biſhop* and *Fountain*, 3 *Lev.* 427, 428.

*7. *J. S.* who was to have had a conſiderable advantage by a will, was drawn in by fraud and falſe ſuggeſtions, to make a compoſition for his intereſt, and to give a releaſe; afterwards *J. S.* being ſenſible of the fraud, makes his will, and thereby (after other legacies) he deviſes all the reſt of his goods and chattels whatſoever to his wife, upon condition that ſhe paid all his debts, and

2 *Bacon's Abr.* 53.

and made her ſole executrix; and it was held, that his right to ſet aſide the releaſe was deviſeable, and the words proper for that purpoſe: Decreed *Trin.* 1701. *Drew* and *Merry.*

(C) *What Words paſs a Fee in a Will.*

1. IF *A.* deviſes land to *B.* to give, ſell, or do what he pleaſes with it, theſe words by the *(a)* intent of the deviſor, convey a fee to *B.* or if the words were to *B. & Sanguini ſuo*, they would paſs a fee, becauſe the blood runs through the collateral, as well as lineal line. *Co. Lit.* 9. *b. Bendl.* 11. 1 *Rol. Abr.* 834.

(a) Though a ſet form of words, and the word *Heirs* particularly, are neceſſary in deeds to convey an inheritance, yet may they be diſpenſed with in laſt wills, at which time it is preſumed, that the teſtator is *inops Conſilii*; and therefore, if a man deviſes lands to another *in perpetuum*, or *in Feodo ſimplici*, or to him and his aſſigns for ever, or to him and his; or that ſuch a one ſhall be univerſal heir; in all theſe caſes a fee paſſes by the will; for it is evidently the deviſor's intention, that the gift ſhould continue beyond the life of the deviſee. *Co. Lit.* 6. *b.* 1 *Bulſt.* 222. *Bendl.* 11. *Mour* 57.

2. A deviſe to a man and his ſucceſſors carries a fee; for by the word *Succeſſors* is intended Heirs, *quia Hæres ſuccedit Patri.* Cro. Jac. 416. 1 Rol. Abr. 835.

3. If a deviſe be in theſe words, *I releaſe all my lands to* A. *and his heirs*; *A.* has a fee-ſimple; for where the intention of conveying appears, the law diſpenſes with the form in a will. *Bendl.* 34.

4. I appoint that *J. S.* ſhall have my inheritance, if the law allows it, or that *J. S.* ſhall be heir of my lands; theſe words are ſufficient to convey a fee. *Hob.* 2.

Vid. ant. poſt. 182. *pl.* 20. which ſeems cont' to this caſe.

5. If a man deviſes land to his wife for life; and after her death to his three daughters, equally to be divided; and if one dies before the other, then one to be heir to the other, equally to be divided; this laſt clauſe gives a fee to the daughters; for the word *Heir* is *Nomen operativum*, and chiefly in a will ſhall be taken in its full extent; and then it reaches the moſt remote heir. 1 *Rol. Abr.* 833.

6. *A.* deviſes land to his ſon and heir; and if he dies before his age of twenty-one years, and without iſſue of his body then living, the remainder over, he ſurvives the twenty-one years, and ſells the land; and the ſale was adjudged good; for he had a fee-ſimple preſently, the eſtate-tail being to commence upon a ſubſequent contingency. *Collenſon* and *Wright*, 1 *Sid.* 148.

7. If a man deviſes lands to *A.* for life, and after his deceaſe, the whole remainder of theſe lands to *B.* theſe words paſs a fee in the remainder to *B. Norton* and *Ladd*, 1 *Lut.* 762.

2 *Bac. Abridgment* 54.

8. If lands are deviſed to truſtees, without any words of limitation, to ſupport the truſt of eſtates of inheritance, they by implication muſt have an eſtate of inheritance ſufficient to ſupport the truſt; for there is no difference between a deviſe to a man for ever, and to a man upon truſts, which may continue for ever: Adjudged in the caſe of *Shaw* and *Wright*, *Paſc.* 1 *Geo.* 2. *in B. R.*

9. If *A.* deviſes land to *B.* for life, the remainder to *C.* paying ſeveral ſums in groſs; *C.* hath a fee, though all the ſums together do not amount to the annual rent of the land, for the deviſe ſhall be intended for his benefit; and if he had only an eſtate for life, he might die before he would receive the legacies out of the land

and, and conſequently be a loſer; for where there is a ſum in groſs to be paid, then the deviſee hath a fee, though the ſum be not to the value of the land. *Collier's* Caſe, 6 *Co.* 16. *Cro. Eliz.* 378. *Cro. Jac.* 527. *Cro. Car.* 158. *Co. Lit.* 9. *b.* 5 *Co.* 21.

10. So if *A.* deviſes lands to *B.* in conſideration that *B.* will releaſe 100*l.* due to him, to the executors of *A. B.* has a fee-ſimple upon his releaſe of the debt; for the deviſe ſhall be intended for his benefit, and an eſtate for life might be determined before he could receive 100l. out of the land. *Bendl.* 15.

11. If a man deviſes 100*l.* in legacies, to be paid within a year, to ſeveral perſons, out of land to the value of 10*l.* yearly, and then deviſes the land to another, the deviſee has a fee in the land; for though the deviſe be not to him paying 100*l.* yet ſince he muſt take the land ſubject to the charge of the legacies, he muſt have a fee to have any benefit by the deviſe. 2 *Lev.* 249. *vide* 2 *Salk.* 685, S. P.

12. But if *A.* deviſes lands to *B.* paying ſo much, or ſuch ſums out of the profits of the lands, the deviſee takes but an eſtate for life; for although he takes the land charged, yet he is to pay no farther than he receives, and ſo can be no loſer. 6 *Co.* 16. 2 *Mod. Rep.* 25.

Whether the word *paying* out of lands in general, and not mentioning any certain time, ſo that a loſs may appear, paſſes a fee ſimple, *quære*, & *vide* 2 *Vern.* 106.

13. So if the deviſe had been to *B.* paying an annual ſum to another, this had been an eſtate for life; for he may pay this out of the yearly profits, without any loſs to himſelf. *Vide Cro. Car.* 158. 1 *Jon.* 211. 1 *Bulſt.* 194. *Cro. Car.* 416. *Cro. Jac.* 527. *Comp.* 841.

Qu. As if every the profits may not ſometimes equal the annuity, and the deviſe of the annuity being general, (unleſs that be here a miſtake), ſubjects him to pay it at any rate; and then he may be under a poſſibility of loſing, which is carefully avoided in all the above caſes.

14. If a man deviſes to his younger brother all his lands, tenements and hereditaments, and all his perſonal eſtate, and whatever elſe he had in the world, and makes him executor, deſiring him to pay his debts and legacies; the deviſee has a fee ſimple by theſe words: adjudged on a ſpecial verdict in *C. B. Hil.* 1713. *Ackland* and *Ackland*, 2 *Vern.* 687.

1 *Salk.* 239. *Hil.* 8. *Ann. Hopewell* and *Ackland*, I take to be the S. C. and P.

15. If a man deviſes 50*l.* to be paid in three months, and all the reſt and reſidue of his real and perſonal eſtate whatſoever he gives to his dearly beloved wife, whom he makes ſole executrix; by theſe words the wife has a fee-ſimple in the lands. Decreed *Mich.* 1706. *Murray* and *Wife*, *Ibid.* 564.

Com. digeſt 281. Vol. 6. *Comp. Rep.* 299. 657. 7 *Brown's* P. Cas. 467, S. C. *Prec. in Chan.* 264, S. C. and decree, upon time taken by L.d. K. to conſider of this point.

16. So where the teſtator, being ſeiſed of copyhold and freehold lands, deviſed all the reſt of his eſtate, whether freehold or copyhold, to his wife and children, equally to be divided amongſt them; and it was held that the word *eſtate* muſt ſignify the intereſt he had in the land, and ſo paſs a fee. *Carter* and *Horner*, 4 *Mod.* 89. For this *vide Stile* 281. 2 *Lev.* 1. 1 *Mod. Rep.* 100. 2 *Chan. Ca.* 262.

17. *A.* deviſed in the following words, *I give certain lands to* S. and I give to *John* Earl of *B.* my ſon-in-law, 5000*l.* and all my mines, all which I give to my ſaid ſon-in-law, his executors and aſſigns, together with my plate and jewels, and *all other my eſtate real and perſonal*, not otherwiſe diſpoſed of by this

S. C. cited 2 *Will. Rep.* 524, *per* maſter of the rolls, *Eaſter* 1729, in the caſe of *Barry* and *Edgworth*, as a reſolution

given on great conſideration, in which the L.d. *Cowper* when of counſel diſcouraged a writ of error in parliament.—S. C. cited by *Talbot* C. *Mich.* 1735. *Ca. in Eq. Temp. Talbot* 162.

this my will, for to be given by him to his children, as he ſhall think convenient, I ſolely truſting to his honour and diſcretion, that he will give them ſuch proviſion as will be neceſſary; and another clauſe was, whereas I have contracted for the ſale of my fee-farm rents, my will is, that if my debts ſhall not be ſatisfied out of my other eſtate, my executors (whereof the earl was one) ſhall and may ſell ſome part, or all of them, for payment of them, notwithſtanding the rents are not deviſed by this my laſt will; and the queſtion was whether his fee-farm rents ſhould paſs to the earl of *B.* and for what eſtate: *Et per Holt* C. J. who delivered the reſolution of the court, the rents paſs by theſe words, *all my real and perſonal eſtate*, for the word *eſtate* is *Genus generaliſſimum*, and includes all things real and perſonal, and the fee of the rents paſſes, at leaſt the whole eſtate of the deviſor, for all his eſtate is a deſcription of his fee. *Counteſs of Bridgwater* and *Duke of Bolton*, 1 *Salk.* 236.

2 *Will. Rep.* 523. S. C. and decree. The maſter of the rolls ſaid, that the law ſeemed ſettled in this point, by the caſe of *Counteſs of Bridgewater* and *Duke of Bolton*, above.

18. *J. B.* a young lady being in eight days time to be married to the defendant, being taken ill, made her will, and after ſeveral ſpecifick and pecuniary legacies, deviſes in theſe words, *Item, I give and bequeath all my lands and eſtate in* upper Cateſby *in* Northamptonſhire, *with all their appurtenances*, to William Edgworth *of* St. Margaret, *Eſq.*; and made him and Mrs. *Rudge* executors and reſiduary legatees, and died ſeiſed of a real eſtate of the value of 200*l. per Ann.* and poſſeſſed of about 3000*l.* perſonal eſtate, and the plaintiff's wife was her ſiſter and heir; and the only queſtion was, whether the defendant had an eſtate in fee, or only for life; and it was agreed, that a deviſe of all her eſtate would have paſſed a fee; but a difference was endeavoured between ſuch a deviſe of all her eſtate generally, and a deviſe of all her eſtate at ſuch a place; that this was only a deſcription of the place where the eſtate lay, and no deviſe of the intereſt which ſhe had in that eſtate farther than for life; and it was agreed clearly, that a deviſe of all her lands would paſs only an eſtate for life, and not the eſtate in fee, which ſhe had in thoſe lands: but the maſter of the rolls was clear of opinion, that he had an eſtate in fee, becauſe the lands paſſed by the firſt words, and the intereſt in thoſe lands by the ſecond; and if the word *eſtate* meant nothing more than the lands, it would be uſeleſs; but if the deviſe had been of all her lands or eſtate at ſuch a place, he thought that would not have paſſed the fee, but would have been taken, according to the common acceptation, for her lands at ſuch a place; but as this was, it muſt be a fee; and decreed accordingly at the rolls. *Paſc.* 1729. *Barry* and *Edgworth.*

2 *Bac. Abr.* 55. S. C. *t. t. Verb.*

19. But where a man ſeiſed of *black acre* in fee by mortgage, which was forfeited, and of *white acre* as his own inheritance, deviſed *white acre* to his brother, and then deviſed all the reſidue of his goods, leaſes, mortgages, eſtates, debts, ready money; and other goods, whereof he was poſſeſſed, after debts and legacies paid, to his wife, and made her executrix, and died; and it was held, that this was no deviſe in fee to the wife of the mortgaged land, for the word *eſtate* is coupled here with chattles, which intended that he meant only eſtates for years; and the rather, becauſe the words, *whereof he was poſſeſſed*, ſhew that he intended only to give her chattles and the mortgage money, and not the inheritance of the land. *Wilkinſon* and *Merryland*, *Cro. Car.* 447. 1 *Rol. Abr.* 834. (D)

(D) *What Words paſs an Eſtate-Tail, and for Life.*

For this head, *Vid.* 2 *Bac. Abr.* 56. *&c.*

1. IF lands are deviſed to one, and if he die before iſſue, or if he depart not leaving iſſue, or if he die not having a ſon (*a*) all theſe limitations (*b*) create an eſtate-tail. 2 *Vern.* 766.

(*a*) *Son* is *Nomen collectivum*, 1 Vent. 231. vide p. 181, pl. 14. (*b*) Here it muſt be obſerved, that the intent of the diviſor will ſupply thoſe words which are neceſſary in conveyances at common law: as if lands are deviſed to a man and his heirs male, the law will give him an eſtate-tail, and ſupply the words *(of his body)*; ſo a deviſe to one and *ſemini ſuo*, creates an eſtate-tail; but a deviſe cannot direct an inheritance to deſcend againſt the rules of law; and therefore if *A.* deviſes to *B.* and his heirs male, though this is an eſtate-tail, yet if *B.* has iſſue a daughter, who has iſſue a ſon, he ſhall never inherit; for the rule is, whoever claims as heir in tail male, muſt convey his deſcent wholly by heirs male. *Co. Lit.* 9. *b.* 25, 271. *Hob.* 33. 1 *Vent.* 228.

2. So if a man deviſes in theſe words, *and if it pleaſe God to take my ſon* R. *before he ſhall have iſſue of his body, ſo that the lands deſcend to his brother*, this is an eſtate-tail in *R. Owen.* 29.

3. If *A.* deviſes to the eldeſt ſon *J. S.* and the heirs male of his body, for the term of 500 years; provided, if he, or any of his iſſue male alien the premiſſes, then to remain over, this is an eſtate-tail, and the limitation for 500 years void; for though generally a deviſe to a man and the heirs of his body, for 1000 years, is a term, and not an inheritance; yet here the teſtator's intent was, that it ſhould be an inheritance; becauſe by the proviſo he took care to advance the iſſue of *J. S.* But if it ſhould be a term, then by the deſcent of the inheritance on *J. S.* the term would be merged, and the iſſues would be unprovided, for *J. S.* might alien the eſtate, 10 *Rep.* 78. *Moor* 772, S. C.

4. *A.* having two ſons, *B.* and *C.* deviſed *Black Acre*, to *B.* and his heirs, and *White Acre* to *C.* and his heirs, and further willed, that the ſurvivor of them ſhould be heir to the other, if either of them died without iſſue; though the firſt words were ſufficient to paſs an eſtate in fee, yet the ſubſequent words correct them, and paſs only an eſtate-tail, and the remainder in fee was not contingent, but executed, each ſon being tenant in tail of the part to him deviſed, with remainder to the other. *Cro. Jac.* 695.

5. If a man deviſes lands to his wife for life, and after to her ſon *J. S.* and if he dies without iſſue, having no ſon, then the remainder over; *J. S.* the ſon, by this deviſe, takes an eſtate in tail male; for though the deviſe to the ſon, and if he dies without iſſue, had been a good tail general, yet when the deviſor went further and ſaid, having no ſon, he thereby explained what iſſue he intended ſhould inherit the land, and limited it to the iſſue male. 1 *Rol. Abr.* 837.

6. *A.* ſeiſed of lands, deviſed them to his wife, if ſhe did not marry; and if ſhe did, then his eldeſt ſon preſently after her deceaſe to enter and hold the land to him and the heirs male of his body, the remainder to his other ſons in tail male; the wife did not marry, yet the court reſolved that the lands were intailed by the will, taking the intention of the deviſor to be, that the intail ſhould be created in all events; but that the eldeſt ſon ſhould not enter till after the deceaſe of the wife, unleſs in caſe of her marriage, and then to enter preſently. *Luxford* and *Cheek*, 3 *Lev.* 125.

Qu. of this caſe as it ſeems by the words of the will, that the ſon, even in caſe of the wife's marriage, ſhould not enter till preſently after her deceaſe; which alſo implies, that if ſhe did not marry, ſhe ſhould have

7. But

a greater eſtate than that eſtate for life which ſhe ſhould have even tho' ſhe did marry. The conſtruction in Levinz ſeems to me entirely contrary to the words of the will, and moſt probably alſo contrary to the intention of the teſtator.

7. But where *A.* deviſed all his land to his wife, until his ſon ſhould be twenty-four, and then to his heirs for ever; and when he came to twenty-four, ſhe ſhould have the third part for her life; and if he dies before twenty-four, then ſhe to have all for her life; and after her deceaſe, if the heir has no iſſue, the remainder to *B.* the remainder to the right heirs of the deviſor; the heir came to twenty-four, but no eſtate-tail was created by the will; for the fee-ſimple deſcended to him, and the limitation was to take place, if he died before the age of twenty-four, which he did not. *Dyer* 124. *a.* 1 *Rol. Abr.* 839.

8. A man deviſed all his fee-ſimple lands to his wife for life, and after her death to *A. B.* and *C.* his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they all die without iſſue, then to others named in the will; and it was adjudged, that the daughters had an eſtate-tail. *Cro. Jac.* 448. 1 *Rol. Abr.* 836.

9. So where the deviſe was to a man and his heirs, and if he die without iſſue, that then the land ſhall go to *A.* and *B.* or the ſurvivor of them; adjudged an eſtate-tail in the firſt deviſee; for in theſe caſes the extent of the word *heir* is confined to the deſcendants, or iſſue of the deviſee, ſince otherwiſe the limitation over cannot veſt according to the intent of the deviſor, for they will not allow a limitation of a fee upon a fee. 1 *Rol. Abr.* 836. *Moor* 864. *Hob.* 75. *Poll.* 487. *Cro. Jac.* 448.

10. *A.* having iſſue *B.* and *C.* deviſed ſome of his land to *B.* his eldeſt ſon, and the heirs of his body, after the death of his wife; and if *B.* died, living his wife, then to *C.* his ſon, and deviſed other lands to his other ſon, and the heirs of his body; and if he died without iſſue, then to remain over; *B.* died in the life of the wife, and yet it was adjudged that *C.* could not enter into the land while any iſſue of *B.* remained; for the words of the deviſe, *that if* B. *died, living the wife*, did not abridge the eſtate-tail which was given by the former words, becauſe the teſtator could not be ſuppoſed to intend to prefer the younger ſon before the iſſue of the eldeſt, eſpecially when he had in the former part of the will ſettled it on the eldeſt, and made the ſame proviſion of other lands the ſame way, for the younger ſon. 1 *Bulſt.* 230, 231. *poſt.* 188. pl. 9. *Seems* S. C.

11. *B.* deviſed land to *B.* his ſon, and if *C.* his daughter ſurvived *B.* and his heirs, then ſhe ſhould have the lands; and it was adjudged that *B.* had but an eſtate-tail, for the word *heirs* muſt be intended heirs of his body, for he could not die without collateral heirs while his ſiſter was alive; but if the will had ſaid, that if *J. S.* a ſtranger, ſurvives *B.* and his heirs, then he ſhould have the land, there *B.* had a fee-ſimple, and then the intended remainder muſt be void, for it is to veſt on a contingency of *B.*'s dying without heirs, which is too diſtant to expect; and the whole fee-ſimple being in *B.* there can be no preſent intereſt to veſt in a ſtranger. *Webb* and *Herring*, *Cro. Jac.* 415, 416. 1 *Salk.* 233.

The difference here taken is right; and the reaſon of it is, that in the latter caſe there is no intent appearing to make the words carry any other ſenſe than what they import at law; but in the former it is impoſſible, that the deviſee ſhould die without an heir while the remainder man or his iſſue continue; and therefore the generality of the word *heirs* ſhall be reſtrained to *heirs of the body*; ſince the teſtator could not but know, that the deviſee could not die without an heir, while the remainder man, or any of his iſſue, continued. *per Talbot* C. *Mich.* 1733. *Ca. in Eq. Tempt. Talbot* 2. *Vide* the caſe of *Tyte* and *Wilkins*, *Eq. Ca. Abr.* part 2.

12. So

12. So where *A.* deviſed to *B.* for his life, and to his heirs; and for want of heirs of him, to *C.* in the ſame manner, and for want of heirs of him, to *D.* and his heirs for ever; the jury found that *B.* and *C.* were brothers, and that *D.* was next couſin and heir to them, though not mentioned in the will; and the court held, that they had but an eſtate-tail, and the remainder in fee to *D.* good; for *D.* being couſin and heir to them, proves that he intended heirs of the body; *alſo want of heirs of him*, are to be taken for want of heirs of his body. *Parker* and *Thacker*, 3 *Lev.* 70. 7 Co. 4.

13. A deviſe to *J. S. in perpetuum*, and after his deceaſe, remainder to his heir male in the ſingular number, is an eſtate-tail, for *heir* is *Nomen collectivum.* 1 *Bulſt.* 219.

14. If *A.* deviſes to *B.* for his natural life, and after his deceaſe he gives the ſame to the iſſue of his body lawfully begotten on a ſecond wife; and for want of ſuch iſſue to *J. S.* and his heirs for ever; provided that *B.* may make a jointure of all the premiſſes to ſuch ſecond wife, which ſhe may enjoy during life; this is an eſtate-tail in *B.* for the word *iſſue* is *Nomen collectivum*, and takes in the whole generation. *King* and *Melling*, 1 *Vent.* 225. 2 *Lev.* 58, S. C.

In this caſe the caſe of *Spalding* and *Spalding*, *p.* 188, *Pl.* 9. was cited by *Hale* C. J.

15. But where lands were deviſed to *A.* and his wife, and after their deceaſe to their children, they having then a ſon and a daughter; it was adjudged, that *A.* and his wife had but an eſtate for life, for no greater eſtate had paſſed at common law; and the intent of the deviſor muſt plainly appear, or they will never admit of a conſtruction different from what they would allow in conveyances executed in the life-time of the party; and for that reaſon, when the deviſe is to *B.* and his children or iſſue *B.* having iſſue at the time of the deviſe, it muſt take effect according to the rules of the common law, and *B.* can have but an eſtate for life jointly with his children; but if *A.* had deviſed his lands to *B.* and his children or iſſues, and *B.* had none at the time of the deviſe, then he takes an eſtate-tail; for it is plain, by the intent of the deviſor, that the children ſhall have the land, and they cannot take as immediate deviſees, for they were not *in eſſe*, nor by way of remainder, for the deviſe was immediately to *B.* and his children, and they ſhall be taken as words of (*a*) limitation, *viz.* as children of his body. *Wild's* caſe, 6 *Co.* 17. *b.*

(*a*) If lands are deviſed to one without more words, this paſſes but an eſtate for life: ſo if the deviſe had gone further, to him and his aſſigns, theſe words of themſelves had not inlarged the eſtate. *Co. Lit.* 9. *b.* But though an expreſs eſtate for life is given to the anceſtor, with a limitation to the heir or heirs of his body, or his iſſue; yet regularly the anceſtor takes an eſtate-tail, according to the rule laid down in *Shelly's* caſe, 1 *Co.* 99. *viz.* That where the anceſtor takes an eſtate of freehold, a limitation to his right heir, or heirs of his body, are words of limitation, and not of purchaſe; but the exceptions to this general rule will beſt appear by the caſes themſelves.

16. If a man deviſes to *A.* for life, and afterwards to the next heir male, and to the heirs of the body of ſuch next heir male, this is only an eſtate for life in *A.* for the inheritance is limited or grafted on the eſtate of the heir in the ſingular number, and therefore he ſhall take by purchaſe. *Archer's* caſe, 1 *Co.* 66.

17. But where a man deviſed land to his ſon for ever, and after his deceaſe the remainder to his heir male for ever, with other remainders over; this was held an eſtate-tail in *A.* for though the firſt deviſe being to him for ever, would give him a fee-ſimple, yet the ſubſequent words, *to his heir male*, ſhew what ſort of inheritance the deviſor intended him; and the word *heir* being

ing *Nomen collectivum*, is ſufficient in a will to create an inheritance. 1 *Bulſt.* 219. 1 *Rol. Abr.* 836.

18. If lands be deviſed to *A.* and *B.* equally to be divided, they have but an eſtate for life, for this can mean no more than that they ſhould ſeverally occupy the land. *Cro. Eliz.* 330, 1 *Rol. Abr.* 834.

19. *A.* ſeiſed in fee of a houſe and land belonging to it, deviſes the moiety of the houſe to his wife for her life. *Item*, he deviſes the other moiety of his houſe to his ſecond ſon. *Item*, he deviſes the ſaid houſe, and all the land belonging to it, to his ſecond ſon; yet the ſon took but an eſtate for life, for the ſecond deviſe to the ſon had its effect, by conveying a moiety of the houſe and land which he had not by the firſt deviſe; and there are no words in the will to create a larger eſtate. 1 *Rol. Abr.* 834.

Vid. ante. 176. *Cas.* 5. which ſeems contingent to this caſe.

20. If a man deviſes lands to his three daughters, equally to be divided between them, and if one of them die before the others, that then the others ſhall be her heirs; theſe words give them no intail, but for life only, becauſe it is not to them and their heirs, or heirs of their bodies; wherefore they have only an eſtate for life, with croſs remainders of each one's part to the ſurvivors for life. *King* and *Rumbal*, *Ibid.* 836.

21. A copyholder in fee ſurrenders to the uſe of his will, and by will deviſes his copyhold lands to his wife; and if ſhe hath iſſue by the deviſor, that the iſſue ſhall have it at his age of twenty-one years; and if the iſſue die before that age, or before his wife, *or if ſhe hath no iſſue*, then ſhe ſhall chuſe two attornies, and ſhe to make a bill of ſale of my lands to her beſt advantage; and *per curiam*, ſhe hath only an eſtate for life, and having no iſſue, hath no intereſt to diſpoſe, but an authority only to nominate two who ſhall ſell, and the vendee ſhall be in by the will. *Beal* and *Shepherd*, *Cro. Car.* 199.

Skin. Rep. 558. S. C. 4 mod. 316. *L. Raymond* 37. 2 *Bac. Abr.* 61.

22. A man ſeiſed in fee made a ſettlement of his lands on *G.* his ſon for life, remainder to his firſt *&c.* ſon in tail male, reverſion in fee to himſelf; and afterwards he made his will as followeth: as touching my lands and tenements, my will is, that if my ſon's wife die, during the life of her huſband, without iſſue male, that then he ſhall have power to make a jointure to any other wife; *and for want of iſſue* of his ſaid ſon, then the lands ſhall be and remain to his ſon by any other wife, and his granddaughter ſhall have 4000*l.* *and in caſe of failure of iſſue male* by his ſon *G.* then all his lands ſhall go to his grandchildren and their heirs, ſhare and ſhare alike: and the court held, that it could not be made an eſtate-tail, by tacking the eſtate by the will to the eſtate for life in the ſettlement on purpoſe to ſupport the contingent remainder, becauſe the ſettlement and will are two diſtinct conveyances; and therefore judgment was given, that this was not an eſtate-tail. *Moor* and *Parker*, 4 *Mod.* 316.

L. Raym. 203. S. C. 2. *Bac. Abr.* 60.

23. One by will deviſes lands to *A.* for life, without impeachment of waſte, and in caſe he ſhall have iſſue male, to ſuch iſſue male and his heirs for ever; and after the death of *A.* in caſe he leave no iſſue male, to *B.* and his heirs for ever, and dies; *A.* ſuffers a common recovery, and declares the uſe to himſelf in fee, and by his will deviſes it to *C.* in fee, and dies without iſſue; and the firſt queſtion was, whether by this de-

viſe

viſe *A.* took an eſtate in tail male, or only for life; and it was held to be but an eſtate for life in *A. firſt*, becauſe it was deviſed to him expreſly for life, and that without impeachment of waſte; which would have been needleſs, if it were an eſtate-tail. 2*dly*, the words, *and in caſe* A. *die without iſſue male, or leave no iſſue*, are not to be taken ſubſtantively and abſolutely, but relatively to what was ſaid before, *viz.* if *A.* die without iſſue, who ſhall take the fee as before is appointed; and theſe oblique words cannot be intended to deſtroy by implication the eſtate expreſly deviſed before to the iſſue male of *A.* and there is no uncertainty in theſe words, *to the iſſue male*, which of them ſhall take, if there be ſeveral; for the eldeſt ſhall take the fee by purchaſe; and the court being ready to give judgment on this point, juſtice *Powel*, junior, ſtarted another, *viz.* whether theſe remainders ſhould take place as executory deviſes or contingent remainders; upon which it was twice argued, but before any judgment, the parties agreed, according to 3 *Lev.* 431. but in *Salk.* 224, S. C. it is ſaid to have been further held, that this limitation to the iſſue was not an executory deviſe, being after a freehold, but a contingent remainder; ſo that a poſthumous ſon could never take; but there is no judgment. *Lodington* and *Kime*, 3 *Lev.* 431. 1 *Salk.* 224. But *per Raymond* C. J. in the caſe of *Shaw* and *Weigh*, it was determined, and judgment entered, *Paſc.* 9 *W.* 3. that it was only an eſtate for life; and it was likewiſe decided in the ſame manner in Chancery, and on appeal in the houſe of lords.

Vid. L. *Raym.* 209.

24. *J. S.* deviſed his eſtate to truſtees and their heirs, in truſt for *A.* for life, and to his firſt and other ſons in tail; but in caſe *A.* died without an heir male of his body begotten, the truſt to be void, and in ſuch caſe he gave the eſtate to the defendants; and it was held, that theſe words, *if he die without heir male of his body begotten*, did not give him an eſtate-tail by implication, nor inlarge an expreſs eſtate deviſed to him for life. (*a*) *Bamfield* and *Popham*, 2 *Vern.* 427, 449, S. C. 1 *Salk.* 236, S. C. but ſtated, that the deviſe was to *A.* for life, remainder

1 *Will. Rep.* 54, S. C. 2 *Freem.* 266, 269, S. C.

(*a*) *Note*; the caſe, as ſtated for the opinion of the court of common pleas, was in the words following, *viz. A.* ſeiſed in fee of the lands in queſtion, *Anno.* 1672 made his laſt will in writing, and thereby deviſed the ſaid lands to certain perſons therein named, and their heirs, in truſt, by wood ſales and fines for leaſes, to raiſe money for the payment of his debts; and after his debts paid, in truſt for, and for the uſe of *B.* for his life; and after his deceaſe, in truſt for the uſe of his firſt ſon and the heirs male of his body; and after the deceaſe of the firſt ſon without heir male, then in truſt for ſuch other ſon and ſons, and their heirs male, as ſhould be begotten by the ſaid *B.* in ſeniority one after another; provided that if the ſaid *B.* ſhall die before he come to the age of twenty-one years, or at any time thereafter, without heir male lawfully begotten of his body, that then the truſt ſo limited to the ſaid *B.* ſhould be utterly void; and in ſuch caſe, from and after the death of the ſaid *B.* without heir male by him lawfully begotten, the truſtees to ſtand ſeiſed to the uſe of *C.* and his heirs; the teſtator afterwards annexed a codicil in writing to the ſaid will, and thereby reciting, that he was minded to make ſome alterations in his will, and that he had deviſed all his real eſtate to the ſaid *B.* and the heirs male of his body, by the ſaid codicil declared, that if it ſhould happen, that the ſaid eſtate in tail ſhould determine by the death of the ſaid *B.* without iſſue, before he attain the age of twenty-one years, then the ſaid lands ſhould be enjoyed by the father of the ſaid *B.* for his life, to commence from and immediately after the determination of the ſaid eſtate in tail, as aforeſaid: the teſtator died ſoon after the making the ſaid codicil; the truſt, as to the payment of debts, is performed, and *B.* entered on the premiſſes, and now enjoys them. Q. what eſtate *B.* hath by the ſaid will and codicil: *Note*; *B.* is couſin and heir to *A.* the deviſor; and it was certified by the unanimous opinion of the court, that *B.* had but an eſtate for life; which was accordingly decreed by Ld. K. *Wright*, aſſiſted by *Holt* and *Trevor* C. J. and *Powel* juſt. *Mich.* 1703. and the caſes cited were *Moor* 611. *Yelv.* 19. 30. *Ed.* 3. 18. *Plunkett* and *Holmes*, 1 *Sid.* 27. *Clerk* and *Day*, 1 *Rol. Abr.* 839. *Owen* 148. *Lodington* and *Kime*, 3 *Lev.* 431. 9 *Co.* 173. 2 *Vent.* 55, 211. *Burchett* and *Durdant*, *Raym.* 28, 296. *Liſle* and *Gray*; which caſe *per Holt*, 2 *Jones* 124 miſtakes, in ſaying it was reverſed, for it was affirmed in the exchequer chamber.

der to the firſt ſon of *A.* in tail male, and ſo on to the tenth ſon in tail male, *&c.* by which if there had been more than ten ſons, they muſt be excluded; if it were conſtrued and eſteemed an eſtate for life in *A.*

3 *Mod.* 82. 311. 2 *Show.* 405.

25. If *A.* deviſes to *D.* his daughter for life, and after her deceaſe to her firſt ſon and the heirs of his body; and if he die without heirs of his body, then to her ſecond and other ſons, *&c.* and the heirs of their bodies; and after them to *N. in eadem forma*; and for default of ſuch iſſue to *J. S.* in fee; and after the will was finiſhed, but before publication, the teſtator adds this clauſe, *memorandum*, the intent and meaning of the teſtator is, that *D.* ſhall not alien the lands given to her, but that they ſhall be to her heirs male; and for want of ſuch iſſue, to *N.* This reſtrictive clauſe explains the intent of the teſtator; and therefore *D.* ſhall have an eſtate for life only, and not an eſtate-tail by implication. 1 *Jac.* 2. *Friend* and *Bouchier*, *Skin.* 240.

26. If *A.* deviſes lands to truſtees to pay debts and legacies, and then to ſettle the remainder of one moiety of what ſhould remain unſold to *H.* and the heirs of his body by a ſecond wife, and in default of ſuch iſſue, to her ſon *F.* and the heirs of his body, the other moiety to *F.* and the heirs of his body, with remainders over, *taking ſpecial care in ſuch ſettlement, that it never be in the power of either of my ſaid ſons* F. *or* H. *to dock the intail of either of the ſaid moieties given them as aforeſaid, during their, or either of their life or lives; this* eſtate being only executory, it muſt be conſtrued, as if like proviſion had been contained in marriage-articles; and therefore the ſons ſhall only have eſtates for life conveyed them; but it muſt be without impeachment of waſte. Decreed *Mich.* 1705. *Lennard* and *the earl of Suſſex*, 2 *Vern.* 526.

Vid. 10. *Mod.* 181. *Fitzgib.* 12. 22. 8 *Mod.* 383. *Forteſc.* 133. Ch. caſ. 173. 2 *Bac. Abr.* 61. 2 *Will. Rep.* 476. Qu. if not another *J. B.* than the firſt, *vid* 2 *Will. Rep.* 476. this caſe cited without this remainder mentioned.

* 27. A man ſeiſed in fee deviſed to *J. B.* for his life only, without impeachment of waſte, and from and after his deceaſe, then to the iſſue male of his body lawfully to be begotten, if God ſhall bleſs him with any, and to the heirs male of the bodies of ſuch iſſue lawfully begotten; and for default of ſuch iſſue, remainder to *J. B.* and the heirs male of his body; and for want of ſuch iſſue he limits two remainders over in the ſame words; and it was adjudged, that *J. B.* took only an eſtate for life, for the eſtate was given to him for life, and there was a limitation afterwards to his iſſue, which was a deſcription of the perſon who was to take the eſtate-tail. 11 *Ann. Backhouſe* and *Wells.*

Gilb. Eq. R. 28. *Forteſc.* 58. *Stra.* 798. *Fitzgib.* 7. 8 *Mod.* 253. 382. 2 *Bac. Abr.* 62. 1 *Barn. Rep.* in *B. R.* 54. *Eaſter* 1 *Geo.* 2. *Shaw* and *Wey*, *S. C.* ſays, the judgment below was reverſed.—

28. *A* deviſes lands to his wife for life, and for her better ſupport he gives and bequeaths unto her the ſum of 500*l.* to be raiſed by her executors or adminiſtrators, by ſale of timber, or by ſale of any part of the premiſſes, or otherwiſe by digging, ſinking, getting, and ſale of coal on the premiſſes, or any part thereof, at hers, her executors and adminiſtrators choice and election; and if my ſaid wife ſhall happen to die before the ſaid ſum be raiſed, as aforeſaid, then ſuch perſon whom ſhe had appointed in her life-time, to raiſe, for which I give them and her full power and authority; provided, nevertheleſs, that if either

1 *Mod. Ca. in Law and Eq.* 382. S. terms, ſays, the whole court held, that the ſiſters were only tenants for life; *ergo* reverſed the judgment in the grand ſeſſions—*Forteſc. Rep.* 58. ſays, that the judgment in *B. R.* was reverſed in *Dom. Proc. nemine contradicente.*—*Gibb. Rep.* 29. *Eaſter* 1 *G.* 2. in *B. R.* all the judges held the judgment below wrong, and that it muſt be reverſed.—*Ibid.* 28. So on error brought in the houſe of lords, the judges delivered their opinions, and *Forteſcue* J. *Pengelly* C. B. and *Eyre* Ld. C. J. were againſt the judgment, but all the reſt of the judges and barons argued in ſupport of it; but it was reverſed 28 *April*, 1729.

ither my ſiſters hereafter named, or ſuch perſon for whom my ruſtees hereafter named ſhall be truſtees, ſhall pay unto my wife, her executors, &c. the ſaid ſum of 500*l.* that the ſaid power of ſelling ſhall ceaſe; and after the deceaſe of my ſaid wife, I deviſe all my eſtate before-mentioned to *A. B.* and *C.* and the ſurvivor and ſurvivors of them, upon the truſts hereafter-mentioned, that is to ſay, in truſt for my ſiſters *A. L.* and *D. E.* equally betwixt them during their natural lives, without committing any manner of waſte from and after the deceaſe of my ſaid wife; provided always, that what ſum or ſums of money, in part or in full of the ſaid 500*l.* hereby left my wife, ſhall be really paid my wife, her executors, &c. by either of my ſaid ſiſters: that in that caſe my will is, that ſuch money be likewiſe raiſed by getting of coal on the premiſſes only; and if either of my ſaid ſiſters happen to die, leaving iſſue or iſſues of her or their bodies lawfully begotten, or to be begotten, then in truſt for ſuch iſſue or iſſues of the mother's ſhare, or elſe in truſt for the ſurvivor or ſurvivors of them, and their reſpective iſſue or iſſues; and if it ſhall happen that both my ſaid ſiſters die without iſſue, as aforeſaid, and their iſſue or iſſues to die without iſſue or iſſues lawfully to be begotten, the ſaid truſtees to ſtand and be intruſted to and for my kinſman *J. S.* and the heirs male of his body, &c. and for want of ſuch iſſue, then in truſt for *R. G.* &c. And the chief queſtion was, whether this was an eſtate-tail or an eſtate for life in the ſiſters, who ſurvived the wife; and it was adjudged an eſtate-tail, in the ſiſters, in the great ſeſſions for the county of *Flint*; which judgment was reverſed on a writ of error in the king's bench; but on a writ of error in the houſe of lords, the laſt judgment was reverſed, and the firſt eſtabliſhed, by the opinion of *Eyre* C. J. *Pengelly* C. B. and *Forteſcue* J. againſt the opinion of all the reſt of the judges, who held it only an eſtate for life in the ſiſters. *Shaw* and *Weigh*, 28 *April* 1729.

29. *A.* deviſed certain lands to his eldeſt ſon for life, without impeachment of waſte, remainder to *J. S.* his grandchild for life, without impeachment of waſte, with a power to him to limit a jointure of the ſame land to any woman he ſhould marry for her life; and after his death he deviſed the lands to the firſt ſon of *J. S.* the grandchild in tail, and ſo to the ſixth ſon, and, then deviſed, that if *J. S.* the grandchild ſhould die without iſſue male, the land ſhould remain to *J. B.* and the queſtion was, what eſtate, *J. S.* took by the will; and it was certified by the court of *C. P.* that he took an eſtate-tail; which was decreed accordingly. *Paſc.* 1707. *Langly* and *Baldwin.* Note, *per Raymond* C. J. in the caſe of *Shaw* and *Weigh*, *an eſtate-tail was raiſed here by implication, becauſe the expreſs deviſe was not to all the ſons; for if there had been more than ſix, and the ſix dead, muſt the heir at law have it before a ſeventh ſon?*

1 *Will. Rep.* 759. cited 1 *Will. Rep.* 59. in notes 8 *Mod.* 258. 354 *Fitzgib.* 14. 2 *Bac. Abr.* 61.

30. The plaintiff's father by his will deviſed the eſtate in queſtion to the *plaintiff for life, without impeachment of waſte, remainder*

Fitzgib. 38. *Talb.* caſes 8. 2 *Bac. Abr.* 62. 2 *Will. Rep.*

1. *Papillon* and *Voice*, S. C. *Trin.* 1728. ſays, his honour ſolemnly decreed, that as to the deſe of the lands an eſtate for life only paſſed to the plaintiff, with remainder to the heirs of his ody by purchaſe; and that therefore he ſhould not have the writings, but they ſhould be rought into court; and that the lands to be purchaſed ſhould be conveyed in a ſtrict ſettlement cording to the teſtator's intention. In *Hil.* 1731. Lord *King* (upon an appeal) declared, that e lands deviſed *to* B. *for life*, &c. was within the general rule, and muſt operate as words of limitation

limitation; and consequently create a veſted eſtate-tail in *B.* * and that the breaking into this rule would occaſion the utmoſt uncertainty; wherefore the writings of this eſtate ought to be delivered up to the plaintiff, and that the court had a power over the money directed to be veſted in land; that the diverſity was where the will paſſes a legal eſtate, and where it is only executory; and

mainder to truſtees, during his life, to ſupport contingent remainders with remainder to the heirs of the body of his ſaid ſon, reverſion to himſelf in fee, with a power to the ſon to make a jointure of ſuch a part, and deviſed likewiſe a conſiderable perſonal eſtate to be laid out in a purchaſe of lands, and ſettled to the ſame uſes; and the only queſtion was, whether the plaintiff took an eſtate-tail, or only an eſtate for life, by this will; and the maſter of the rolls, having taken time to conſider of it, decreed that he took only an eſtate for life, as the words were expreſs, and had all the other marks attendant on an eſtate for life, and conſequently that the heirs of his body ſhould take by purchaſe; and though the eſtate would veſt in the firſt ſon, as tenant in tail, by way of purchaſe, yet not ſo as to exclude the other ſons, or their iſſue, from taking the like eſtate, whenever his eſtate determined for want of iſſue; and this he ſaid was ſo reſolved in the caſe of *Trevor* and *Trevor*, by lord *Macclesfield*, aſſiſted with the judges; and as for the perſonal eſtate there could be leſs difficulty as to that than in the conveyance of the legal eſtate in poſſeſſion; and for that he cited 2 *Vern.* 526. *Mich.* 1728. *Papillon* and *Bois*.

the party muſt come to this court, in order to have the benefit of the will; that in the latter caſe, the intention ſhall take place, and not the rules of law: ſo that as to the lands to be purchaſed they ſhould not be limited to *B.* for life, with power, *&c.* remainder to the heirs of his body, but to *B.* for life, with power, *&c.* remainder to truſtees during his life, to preſerve contingent remainders, remainder to his firſt, *&c.* ſon in tail male, remainder over, *&c. Ibid.* 477. 478. * The reporter in a note ſays, though this was Ld. Chan. opinion, yet the queſtion as to the land deviſed was given up, the plaintiff having brought a ſupplemental bill, whereby it appeared, that by his father's marriage-articles he was entitled to an eſtate-tail. *Ibid.* 477. —*Rep. of Sel. Ca. in Chan.* 27, 34. S. C. and decree, by the maſter of the rolls; but it appearing on the ſupplemental bill, as in *Williams*'s note, the decree was varied *per King* C. on an appeal, as to the lands deviſed, but affirmed for a ſtrict ſettlement as to the money.

For this head, *vid.* 2 *Bac. Abr.* 71.

(E) *Of executory Deviſes of Lands of Inheritance; and here of contingent Remainders and croſs Remainders as far as they relate to this Place.*

1. A FEE cannot be limited on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, that it ſhall remain over to another; this laſt limitation is void. So if lands are given by deed to one and his heirs, ſo long as *J. S.* hath iſſue, and after the death of *J. S.* without iſſue, to remain over to another; this remainder is likewiſe void, becauſe the firſt deviſee had a fee, though it was a baſe and determinable fee. *Dyer* 41. *a. Brook* 234. 1 *Co.* 85. *b. Bulſt.* 195. *Plow.* 29. 2 *Leon.* 69. *Co. Lit.* 18. *a. Poph.* 34. 2 *Rol. Rep.* 220. *Godolph.* 353.

2. But yet in a will ſuch limitations may be good upon a contingency that may happen within the compaſs of a life, or lives, *in eſſe*, or a reaſonable number of years; but this not by way of direct remainder, but by way of (*a*) executory deviſe. *Cro. Eliz.* 205. 1 *Rol. Abr.* 626. *Dyer* 124.

See *Eq. Ca. Abr.* part 2. Tit. *deviſe.* (*a*) an executory deviſe is defined a future intereſt which cannot veſt at the death of the teſtator, but depends upon ſome contingency which muſt happen before it can veſt; of which there are three kinds, *firſt*, where the deviſor departs with his whole fee-ſimple, but upon ſome contingency qualifies that diſpoſition and limits a fee on that contingency; and this is new in law, as appears by the following caſes. Second ſort is, when the deviſor gives a future eſtate to ariſe upon a contingency, but does not part with the fee at preſent, but ſuffers it to deſcend to his heir as a deviſe, till his debts are paid, *&c.* to the heirs of *J. S.* when he ſhall have one; and theſe have been frequent: but note, that if an eſtate be limited upon a contingency, after a particular eſtate, capable of ſupporting a remainder, it ſhall then be conſtrued a contingent remainder, and not an executory deviſe. Of the third ſort are leaſehold intereſts or terms for years, for which *vide infra* letter (F), and *vide* 1 *Salk.* 226. 1 *Saund.* 380. 1 *Salk.* 229.

3. One deviſed land in *London* to the prior and convent

ita quod reddant annuatim decano & capitulo ſancti pauli four-
een marks; and if they fail of payment, that their eſtate ſhall
ceaſe, and that the ſaid dean and chapter, and their ſucceſſors,
hall have it; and it was held by *Baldwin* and *Fitzherbert* (the
reateſt lawyers of their age, as my lord *Vaughan* ſays) that
his remainder was void, becauſe the firſt deviſe carrying a fee,
othing remained after to be diſpoſed of, and executory de-
iſes after a fee-ſimple were in former ages unknown. 1 *Brook*
34. *Dyer* 33. *a. Vaugh.* 271. and *per Nottingham* Ld. Chan.
hough this doctrine is now exploded, yet the caſe of *Hinde* and
pon, 19 *Eliz.* 3 *Leon.* 64. *is the firſt caſe wherein the contrary*
as received a ſolemn reſolution.

4. One having iſſue three ſons, *A. B.* and *C.* by his will in *Prec. Cha.* 69.
riting deviſes lands to *B.* his ſecond ſon, and his heirs for ever,
nd if *B.* die without iſſue, living *A.* then *A.* to have thoſe lands
o him and his heirs for ever; *B.* enters and ſuffers a common
ecovery to the uſe of himſelf and his heirs, and then deviſes
hoſe lands to the plaintiff and his heirs, and dies without iſſue,
iving *A.* And it was adjudged, *firſt*, that *B.* had a fee-ſimple
y the deviſe to him and his heirs for ever; and that the other
ords would not ſo correct or qualify it, as to make it an eſtate-
il, not being, if he die without iſſue generally; but upon the
ontingency of his dying without iſſue, living *A.* ſo that if he
rvived *A.* or died in the life-time of *A.* leaving iſſue, *A.* was
o have nothing; and this being a contingency to happen with-
n the compaſs of lives then in being, though the firſt deviſe was
fter a fee, yet the limitation over upon ſuch contingency was
ood, and not within the danger of a perpetuity; for the re-
ainder to *A.* is not a remainder directly, which cannot be af-
er a fee, but takes effect by executory deviſe; and upon de-
rmination of the firſt eſtate, by the happening of the contin-
ency, carries over the land to the other. 2*dly*, It was ad-
udged, that this being a mere collateral poſſibility, was not
ound by the recovery, unleſs he to whom it was limited had
een party by way of voucher; for it had not exiſtence at all,
hen the recovery was ſuffered, and therefore the recom-
ence in value could not extend to it. *Mich.* 18 *Jac.* 1. in *B.*
Pells and *Browne. Cro. Jac.* 590 1. *Rol. Abr.* 611. S. C. *Palm.*
31. 2 *Rol. Rep.* 216. 2 *Leon.* 111. *Vaugh.* 272.

5. One by will deviſes lands to his mother for life, and after
er death to his brother in fee; provided, that if his wife (be-
ng then *enſeint*) be delivered of a ſon, that then the land ſhould
emain to him in fee, and dies, and the ſon is born; and it was
eld, that the fee of the brother ſhould ceaſe, and veſt in
he ſon, by way of executory deviſe upon the happening of the
ontingency. *Dyer* 127. *in margine.*

6. One having iſſue *A.* his only daughter and heir apparent,
y will deviſes lands in *D.* to her and her huſband, and her heir,
pon condition that they ſhould aſſure lands in F. to his execu-
ors and their heirs, to perform his will; and if they failed, then
e deviſed the ſaid lands in *D.* to his executors and their heirs,
nd died; and it was adjudged to be no condition; for then
y the deſcent to the daughter, being heir, it would be deſtroy-
d; but it was held a limitation, or an executory deviſe to his
xecutors, in caſe the aſſurance was not made; and that they
ight for breach thereof enter and ſell; for though a fee cannot

be

be limited upon a fee abſolute, yet upon a fee determinable it may, and enures as a new original deviſe to take effect, when the firſt deviſee failed to make the aſſurance, *Dyer* 33. *a. in margine. palm.* 135. *Cro. Jac.* 592. *Cro. Eliz.* 359, S. C.

7. If *A.* deviſes lands to *B.* for five years, from *Michaelmas* following, the remainder to *C.* and his heirs, and *A.* dies before *Michaelmas*; yet this is a good remainder, though it cannot veſt before the particular eſtate begins; and the freehold cannot be in expectancy, for in the mean time the fee ſhall deſcend to the heir. *Cro. Eliz.* 878.

8. One deviſes lands to his wife, till his ſon came to the age of twenty-one years, and then that his ſaid ſon ſhould have the lands to him and his heirs; and if he dies without iſſue before his ſaid age, then to his daughter and her heirs; this is a good contingent or executory deviſe to the daughter; if the contingency happens, and in the mean time the fee deſcends to the ſon as heir; and if he lives to twenty-one, though he after die without iſſue, or leaves iſſue, though he die before twenty-one, yet the daughter is not to have the lands, becauſe he is to die without iſſue, and before twenty-one, or elſe the daughter cannot take. 2 *Rol. Rep.* 197, 217. *Palm.* 132.

Cited 3 *Lev.* 434 L. *Raym.* 524. *Fearne Con. Rem.* 303. 432. From this caſe it may be obſerved, that equity will conſtrue a will againſt the expreſs words, in order to make it take effect according to the intention of the teſtator—2 *Will. Rep.* 196, S.C. cited by *Macclesfield* C. *Mich.* 1729. in the caſe of *Newland* and *Shephard*.—1 *Will. Rep.* 427, S. C. cited by *Parker* C. and by L. C. J. *Hale*, 1 *Vent.* 230.

9. But where one having iſſue three ſons, *A. B.* and *C.* deviſes to his ſon *A.* after the death of his wife, to him and the heirs of his body lawfully begotten, in fee-ſimple; and if he die in the life of my wife, that then my ſon *C.* ſhall be his heir, and dies; *A.* hath iſſue, and dies in the life of the wife; and it was adjudged, that the iſſue ſhould have the land after the death of the wife, and not *C.* for it was in effect a deviſe to the wife for life, remainder to *A.* in tail, remainder to *C.* in fee, upon the contingency of *A.*'s dying in the life of the wife, and does not abridge the eſtate-tail expreſly given *A.* by his dying in the life of the wife. *Spalding* and *Spalding*, *Cro. Car.* 185; *ante.* 180. *pl.* 10. ſeems S. C.

10. Baron and feme being ſeiſed of a copyhold, to them and the heirs of the baron, he ſurrenders it to the uſe of his will, and then deviſes it to the heirs of the body of the feme if they attain the age of fourteen, and dies without iſſue; and then ſhe marries a ſecond huſband, and has iſſue that attain the age of fourteen, and then ſhe dies; and whether this was a good deviſe by reaſon of the double contingency, *ſcilicet*, the having heirs of her body, and that ſuch heir ſhould live to fourteen, was doubted; but it was admitted, that if the deviſe was good, it muſt be by way of executory deviſe, which is allowable when to take effect within the compaſs of a life, but not after a dying without iſſue, for that tends to a perpetuity, and it cannot take effect by way of remainder; for it is a new deviſe to take effect after her death, and is not as a remainder joined to her eſtate. But the court being divided upon the point of the contingency, it was agreed to be adjourned into the exchequer chamber; and the reporter ſuppoſes the parties agreed afterwards, for he heard no more of it. *Snow* and *Cutler*, 1 *Lev.* 135.

11.

11. If a man, having only one ſiſter and heir, (who had iſſue *A.* and after married *B.* by whom ſhe had iſſue *C.* and *D.*) deviſes lands to his ſiſter until *C.* attains twenty-one, and after *C.* attains that age, to *C.* and his heirs; and if *C.* dies before twenty-one, then to the heirs of the body of *B.* and their heirs, as they ſhall attain their reſpective ages of twenty-one, and dies; *C.* dies before twenty-one, living *B.* and after *B.* dies, *D.* either as heir of *C.* in whom the fee was veſted, or as heir of the body of *B.* (though he could not be ſo during the life of *B.*) being of age after the death of *B.* ſhall have the eſtate by way of executory deviſe, and not the right heir of the deviſor. *Taylor* and *Biddulph*, 2 *Mod.* 289. adjudged.

1 *Freem.* 243. *Taylor* and *Bydall*, *Hil.* 1677, S. C. *Vid.* 2 *Bac. Abr.* 73, S. C. and the books there cited.

12. If *A.* hath iſſue two ſons, *viz. B.* and *C.* and deviſes lands to *B.* for life, and if he dies without iſſue living at his death, that then the fee ſhall remain to the heirs of *B.* for ever, by which deviſe *B.* has only an eſtate for life, the remainder to his heir not executed; and though the reverſion deſcended on *B.* as heir of *A.* yet it drowned not the eſtate for life againſt the expreſs deviſe and intention of the will, but left an opening, as it was termed, for the interpoſition of the remainder, when it ſhall happen to interpoſe between the eſtate for life and the fee; and that this being a contingent remainder, and not an executory deviſe, was barred by the recovery ſuffered by *B.* *Holmes* and *Plunket*, 1 *Lev.* 11.

Keb. 29. 119. 1 Ld. *Raym.* 208. cited.

13. If one deviſes lands to his wife for life, and if ſhe hath ſon, and cauſes him to be called by the chriſtian and furname of *Sampſon Shelton*, then after her death deviſes the ſame to her ſon; and if he die before twenty-one, to the right heirs of the deviſor, and dies; and after the wife marries *Broughton*, by whom ſhe has a ſon, which ſhe cauſed to be chriſtened *Sampſon Shelton*, *&c.* the deviſe is good by way of contingent remainder, but not by way of executory deviſe; for when a contingent eſtate is limited, and depends upon a freehold, which is capable of ſupporting a remainder, it ſhall never be conſtrued an executory deviſe, but a contingent remainder; adjudged, and that the reverſion deſcending to the heir of the deviſor till the contingency happened by the bargain and ſale, and fine thereof, by the heir of the deviſor to *B.* and his wife, and their heirs, before the birth of their ſon, the contingent remainder was deſtroyed. *Trin.* 22 *Car.* 2. *Pureſoy* and *Rogers*, 2 *Saund.* 380.

Mich. 1734. S. C. cited by *Talbot* C. in the caſe of *Hopkins* and *Hopkins*. —— *Vide Eq. Ca. Abr.* part 2. 3 *Salk.* 299. pl. 5 cites S. C. adjudged. 4 *Mod.* 284. 2 *Lev.* 39. 3 *Keb.* 11. 1 *Wils.* 225. *Burr.* 2. 57.

14. *A.* having two ſons *B.* and *C.* deviſed lands to *B.* for fifty years, if he ſhould ſo long live; and as for my inheritance after the ſaid term, I deviſe the ſame to the heirs male of the body of *B.* and for default of ſuch iſſue, then to *C.* And the court reſolved *firſt*, that *B.* had not an eſtate-tail by implication upon the words *without iſſue*, becauſe the deviſor had given him an eſtate for years by expreſs words, and the court cannot make ſuch a conſtruction againſt expreſs words, when thereby they would drown the eſtate for years, and make an eſtate of inheritance. *2dly.* The court held this deviſe to the heirs male of the body of *B.* to be void in its creation, for want of an eſtate of freehold to ſupport it; and they ſeemed not to think it an executory deviſe, becauſe it was limited as a remainder, and becauſe it was limited *per verba in præſenti*; for if one deviſe his eſtate to the heir of *J. S.* and *J. S.* is living, the deviſe ſhall not be conſtrued an executory deviſe, and ſuch a deviſe is there-

Skin. 408. *Comb.* 254. *Holt.* 227. *Caſ.* B. R. 52. 3 *Lev.* 373. 2 *Danv. Abr.* 519. pl. 13. Ld. *Raym.* 3. S. C.

therefore void; but if it were to the heir of *J. S.* after the death of *J. S.* that is good as an executory deviſe. 3*dly*, The court held the limitation to the heirs of *B.* was become void by the event, whatever it was, in its creation; becauſe *B.* is now dead without iſſue. 4*thly*, The court held, that if the remainder to the heirs male of *B.* was void in point of limitation, then the next remainder limited to *C.* took effect preſently. *Goodwright* and *Corniſh*, 1 *Salk.* 226. 4 *Mod.* 255, S. C.

15. A man ſeiſed in fee, deviſed to truſtees for eleven years, and then to the firſt ſon of *A.* and the heirs male of his body, and ſo on to the ſecond, third, *&c.* ſons in tail male, provided they the ſaid ſons ſhall take on them my ſurname; and in caſe they or their heirs refuſe to take my ſurname, or die without iſſue, then I deviſe my land to the firſt ſon of *B.* in tail male, provided he take my ſurname; and if he refuſe, or die without iſſue, then to the right heirs of the deviſor. *A.* had no ſon at the time of the deviſe, and died without iſſue; and *B.* had a ſon, who was living at the time of the deviſe, who took the ſurname of the deviſor. The whole court agreed, that the deviſe to *B.* was not a contingent remainder, becauſe of the precedent eſtate for years, which could not ſupport it; it appears likewiſe by the caſe, to be the opinion of *Treby* C. J. and juſt. *Powell*, that it could not be good as an executory deviſe, if it were conſidered as a deviſe to the heirs of *A.* being limited *per verba in præſenti*; but *Blencow* J. held, that the deviſe to the ſon of *A.* was future; for he ſuppoſed the teſtator knew that *A.* had no ſon, and the rather becauſe he does not name him; but it was adjudged and affirmed in *B. R.* that the remainder to *C.* was good, and veſted in him. *Scatterwood* and *Edge*, 1 *Salk.* 229.

A deviſe to the firſt iſſue male of *A. A.* having no iſſue at the time of the deviſe, is void. *Vide Ca. in B. R. Temp. C.* was the ſon of *B. W.* 3. 278, S. C. 1 *Freem.* 243. S. C. cited *per cur'*.

16. A man deviſed lands to his executors till his ſon ſhould come of age, and when his ſon ſhould come of age, then he ſhould enjoy it for him and his heirs; this is a remainder executed in the ſon, and not in contingency; for the words *when* and *then*, in this caſe, only denote the time when the remainder is to execute, and will no more make the remainder contingent, than in the common caſe, when a leaſe is made for life or years; and after the deceaſe of the tenant for life, or the expiration of the term of years, then to remain to another; ſo though the words be, *after the term it ſhall remain*, yet it is a preſent and not a contingent remainder; for where words refer to that which muſt needs happen, there ſhall be no contingency. *Boraſton's* Caſe, 3 *Co.* 19.

17. *A.* having iſſue five ſons (his wife being *enſeint* with a ſixth) deviſed two thirds of his land to his four younger ſons and the child *in ventre ſa mere*, if it were a ſon, and their heirs; and if they all die without iſſue male of their bodies, or any of them, that the lands ſhall revert to the right heirs of the deviſor; by this deviſe the younger ſons are tenants in tail in poſſeſſion, with croſs remainders over to each other; and no part ſhall revert to the heirs of the deviſor till all the younger ſons be dead without iſſue male of their bodies. *Dyer* 303. *Hob.* 3[illegible]

18. A man having two ſons, deviſed part of the lands to one of them and his heirs, and the reſt to the other and his heirs; and further wills, that the ſurvivor ſhall be heir to the other if either dies without iſſue; by this the deviſees are tenants in tail, with remainder in fee executed of each other's part. *Cro. Jac.* 695.

19. B[illegible]

19. But where a man having three ſons, and ſeiſed of three houſes, deviſed a houſe to each ſon and his heirs, with this proviſo, that if all his ſaid children ſhall die without iſſue of their bodies lawfully begotten, that then all his ſaid meſſuages ſhall remain over, and be to his wife and her heirs; and it was held in this caſe, that theſe words did not raiſe any croſs remainders, but that at the death of any of the ſons his houſe ſhall go immediately to the wife; and though a croſs remainder may be by implication, where lands are limited to two, yet they cannot riſe where three or more houſes are limited to three, without expreſs limitation, becauſe of the inconvenience. *Gilbert* and *Witty*, *Ibid.* 655. *Vide* 1 *Vent.* 224. where *per Holt* C. J. no croſs remainders can be created by implication in a deed, nor any in a will between three, or more, unleſs the words of the will do plainly expreſs the intent of the deviſor to be ſo; as where *Black Acre* is deviſed to *A.* *White Acre* to *B.* and *Green Acre* to *C.* and if they die without iſſues of their bodies, *vel alterius eorum*, then to remain; there, by reaſon of the words *alterius eorum*, croſs remainder ſhall be. *Dyer.* 330.

per Hale. C. J.

(F) *Of executory Deviſes of Leaſes for Years, and here of the Limitation of the Truſt of a Term, as far as it relates to and agrees with the Deviſe thereof.*

For this head, *vid.* 2 *Bac. Abr.* 76. &c.

1. IF a termor deviſes his term to *A.* for life, the remainder to another, though *A.* has the whole eſtate (for that is in him during his life) and ſo no remainder can be limited over at common law; yet it is good by way of (*a*) executory deviſe. *Cro. Jac.* 198. 1 *Rol. Abr.* 610. 8 *Co.* 94.

(*a*) The great queſtion in theſe caſes was, whether the diſpoſition of the term to a man for his life, was not ſuch a total diſpoſition of it, that no remainder could be limited over, it being in the eye of the law a greater eſtate than for any number of years; which was reſolved in the affirmative in the reign of 6 *E.* 6. *Dyer* 74. by all the judges of *England*; but this reſolution ſeeming very ſevere, and againſt natural juſtice, that a man ſhould be hindered from making proviſion for his family and the contingencies of it, occaſioned a contrary reſolution, 29 *Eliz. Co. Lit.* 46. *Dyer* 35. for the judges obſerving the good effect ſuch limitations by way of truſt had, which were allowed in Chancery, permitted farmers to diſpoſe of their leaſes in the ſame manner by laſt will; and then the chancery, the better to ſecure them in it, allowed of bills by the remainder-man to compel the deviſee of the particular eſtate to put in ſecurity, that he in the remainder ſhould enjoy it, according to the limitation; but when they perceived that this multiplied Chancery ſuits, they reſolved that there was no need of that way. 10 *Co.* 47. *a.* 52. *b.* 1 *Sid.* 451. but that the particular deviſee ſhould not have power to bar the remainder-man; ſo that the law has been long ſettled, that executory deviſes are good, provided the contingency is to happen within a life or lives all *in eſſe*; for there can be no tendency to a perpetuity, which was one great miſchief apprehended from theſe kind of limitations; but what kind of executory deviſes do or do not tend to a perpetuity, will be beſt ſeen by the caſes themſelves.

2. If *A.* poſſeſſed of a term for years, deviſes it to *B.* his wife for eighteen years, and after to *C.* his eldeſt ſon for life, and after to the eldeſt iſſue male of *C.* for life, though *C.* had not any iſſue male at the time of the deviſe and death of the deviſor; yet if he had iſſue male before his death, this iſſue male ſhall have it as an executory deviſe; for although there be a contingent upon a contingent, and the iſſue not *in eſſe* at the time of the deviſe, yet in as much as it is limited to him but for life, it is good, and all one with *Manning*'s caſe, upon a reference out of chancery to juſtice *Jones*, *Croke* and *Barkley*, between *Cotton* and *Heath*, by them reſolved, without queſtion. *Rol. Abr.* 612.

3. If *A.* poſſeſſed of a term, deviſes to *B.* his wife for life, and after her death to his children unpreferred; and after *B.* dies,

dies, *C.* then being the only daughter of *A.* ſhall have it; for an executory deviſe that hath a dependance on the firſt deviſe, may be made to a perſon uncertain. 1 *And.* 60, 61.

2 *Chan. Rep.* 14, S. C. *Vid.* 1 *Sid.* 450. in 1 *Vent.* 79. S. C. imperfectly reported. 2 *Keb.* 637.

4. If one poſſeſſed of a term deviſes it to his wife for life, the remainder to his firſt ſon for life; and if he dies without iſſue, to his ſecond ſon, *&c.* The remainder to the ſecond ſon is void; for the remainder of a term cannot depend upon a poſſibility ſo remote as the dying without iſſue; although it was objected that the deviſe was not to the firſt ſon and his iſſue, (in which caſe it was agreed it ſhould go to his executor) but it was given to him for life only, with an executory deviſe to the ſecond ſon upon the contingency of the firſt not having iſſue at the time of his death. *Love* and *Windham*, 1 *Lev.* 290.

1 *Jon.* 15. Palm. 333. 6. 2 *Rol. Rep.* 129. 2 *Rol. Abr.* 212. 3.

5. If a man poſſeſſed of a term for years, deviſes it to *D.* his wife for life, and after to *W.* his eldeſt ſon, and his aſſigns; and if he dies without iſſue then living, to *T.* this being a perpetual limitation by intendment of law, is void; and if men ſhould be admitted to make ſuch deviſes, there would not be any end of them, nor any certainty. *Child* and *Bayly*, *Cro. Jac.* 459, 460. 1 *Rol. Abr.* 613. Note; *The authority of this caſe is ſhaken by the duke of* Norfolk's, *and denied to be law.* 1 Salk 225. vide *Pl.* 8. *Bro. Ch. Cas.* 127 *Powell* on *deviſes*, 226. 3 *Com. Dig.* 443. *Doug.* 761. 763.

Vid. 2 *Bac. Abr.* 77.

6. If a man poſſeſſed of a term deviſes it to his ſon, and if he dies unmarried, and without iſſue, to his daughters; and if his ſon be married, and has no iſſue then living to enjoy it, then after the death of his ſon's wife, he deviſes it to his ſaid daughters; the deviſe to the daughters is void, being a limitation after the death of their brother without iſſue; for it is not to be taken (as objected) that the dying ſhould be without iſſue living at his death, and ſo the contingency to happen within the compaſs of a life; and if it ſhould be intended of ſuch a dying without iſſue, yet the court held it would be void according to *Child* and *Bayly*'s caſe; for tho' ſuch a deviſe hath prevailed in caſe of an inheritance, as in *Pell* and *Brown*'s caſe, yet it hath not yet prevailed in caſe of a term; *and the court ſaid they would not extend the deviſes of chattels to make perpetuities farther than they had been.* Gibbons *and* Summers. 3 Lev. 22, 23. *Quære.*

Vid. 2 *Bac. Abr.* 77.

7. *A.* having iſſue ſeveral ſons (the eldeſt *non compos*) created a term for years, and by another deed declared the truſt thereof to his ſecond ſon and the heirs male of his body, remainder to his other ſons, provided that if his eldeſt ſon died without iſſue, or not leaving his wife *enſeint* with a child, living the ſecond ſon, ſo that the earldom of——deſcended on the ſecond ſon, then the ſaid term to remain to the third ſon and the heirs male of his body, with like limitations to the other ſons; the eldeſt ſon died without iſſue, living the ſecond; and this limitation to the third ſon was held good; and ſo decreed by lord *Nottingham*, contrary to the opinion of the three chief juſtices who aſſiſted him. 3 *Chan. Ca.* 1. *Duke of Norfolk*'s caſe. *Note*; This decree was reverſed by *North* Ld. K. 1 *Vern.* 163. But upon an appeal to the houſe of lords, the laſt decree was reverſed, and lord *Nottingham*'s eſtabliſhed. 1 *Chan. Ca.* 53. Note; *Executory deviſes and limitations of the truſt of a term are governed alike.* 1 Vern 234.

8. If

8. If a term is deviſed to *A.* and the heirs of his body, and *A.* die without iſſue, living *B.* then to *B.* this is a good limi-tion, the contingency ariſing within the compaſs of a life. djudged between *Lamb* and *Archer*, 5 *W. & M. in B. R.* 1 *lk.* 225. *Carth.* 166. *Com.* 208. *Skin.* 240. *Holt.* 227. *Caſes* B. 44. *And* Child *and* Bayly's *Caſe denied to be law.* Vide *Pl.* 5.

Carth. 266. S. C. Here is not any of the inconveniencies of perpetuities; for the eſtate is not unalienable, but only during one

, and this upon a contingency which might determine within a little time, if the party dies; d judgment *niſi. Prec. in Chan.* 15, S. C. *Fearne Cont. Rem.* 355. and decree, ſays the deviſe s to *A.* his heirs, executors, and aſſigns.

9. *J. S.* deviſes to his ſon a leaſehold eſtate, to his executors, lminiſtrators and aſſigns for ever; but if he died before twen--one without iſſue, in that caſe deviſes it over to his brother; nd the queſtion was, whether the remainder over was good. was objected, that it was a perpetuity, for that the remain-er depends on the ſon's dying without iſſue; for if he die be-re twenty-one, though he leaves a child, and that child af-rwards dies without iſſue, the ſon may be ſaid to be dead be-re twenty-one without iſſue: *Sed non allocatur*; and the court ecreed the remainder over good. *Trin.* 1690. *Martin* and *Long*, *Vern.* 151. And a like caſe ſaid to have been adjudged in he exchequer, *Smith* and *Smith.*

2 *Atk.* 308. 3 *Atk.* 383. 1 *Burr.* 272. 2 *Vez.* 318. *Fearne Cont. Rem.* 341 to 378.

* 10. One *F.* being poſſeſſed of a term for years, deviſes it o his wife for life, and after her death to *R. F.* for her life; nd after her death to *T. F.* and his children; and then deviſes n this manner; and if it ſhall happen the ſaid *T. F.* do die be-ore the expiration of the ſaid term, not having iſſue of his ody then living, then to go over to the plaintiffs for the reſi-due of the term; the defendant's title was by an aſſignment of *R. F.* and *T. F.* of all their eſtate, right, title and intereſt. *R. F.* was dead, and *T. F.* died without iſſue, and the plaintiff rought his bill to have an aſſignment of the term purſuant to he will; all that was inſiſted upon for the defendant, to ifference this caſe from the duke of *Norfolk*'s of a term, and of *Pell* and *Browne*'s caſe, of a fee, was, that this contingency of is dying without iſſue was not confined to his own death, ut that the words, *then living*, ſhould relate to the words, *be-re the expiration of the term*; and ſo this went further than any f the caſes had ever yet been carried, for he might have iſſue or ſeveral generations; and yet if ſuch iſſue failed at any time efore the expiration of the term, then it was to go over; and his in a long term tended plainly to a perpetuity, and there-re ought not to be allowed; but by the deviſe to *T. F.* and is children, and the ſubſequent words, *and if he die without ſue*, the whole term and intereſt was veſted in him, and he ight diſpoſe thereof as he thought fit, and it could not be eſtrained by the words *then living*, which related only to the ords *before the expiration of the term*, and ſo the remainder er to the plaintiff void; but for the plaintiffs it was argued nd decreed, that the remainders to them was good by way executory deviſe, and that the words *then living*, muſt relate the time of his death; for otherwiſe there would be no dif-rence between this and the common limitations of a term to e and the heirs or iſſue of his body; and if he dies without ſue, the remainder to another, which is void; for there it uſt likewiſe be intended, if he die without iſſue before the ex-ration of the term, or during the term; ſince after the expi-tion of the term he can limit no remainders over, becauſe

nothing remains then to be limited; but here it being limited over upon this contingency, if he die without iſſue then living, *viz.* at the time of his death, it is good, becauſe the contingency muſt happen within one life, or not at all; for upon his death it will be certainly known, whether he leaves iſſue or not; if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compaſs of a life, is good as an executory deviſe, and differs in nothing from the duke of *Norfolk*'s caſe, ſave only that there it was by proviſo, and alſo upon the death of another perſon without iſſue then living; and here it is upon his own death, which makes no manner of difference. *Fletcher*'s caſe, decreed *Trin.* 1709.

Gilb. Eq. Rep. 149, S. C. *in totidem Verbis.* 1 *Wil. Rep.* 432. *Eaſter* 1718. *Target* and *Gaunt & al*, S. C. ſays, the deviſe was to *H. for his life, and no longer, and after his deceaſe to ſuch of the iſſue of the ſaid* H. *as* H. *by his will ſhould appoint*; and in caſe *H.* ſhould die without iſſue, then the teſtator deviſed the ſame over: *H.* died without iſſue living at his death; *Parker* C. held the deviſe over good. The reporter in a note ſays, the words which are in *Italic* are all omitted in the regiſter-book, though they are inſerted in all the cotemporary reports of this caſe, and ſeem here to be the principal foundation of the decree.—*Lucas's Rep.* 403, S. C.

11. A man poſſeſſed of a term for thirty-one years, deviſes it to his ſon *H.* during his minority; and if he attains to his age of twenty-one years, then to him during his life, if the term ſhall ſo long continue, and no longer, and after his death to ſuch of his iſſue to whom he ſhall deviſe it; but if he die without iſſue, then to his other ſon *G.* for the reſidue of the term. *H.* afterwards died without iſſue, or without making any diſpoſition of the reſidue of the term; and the only queſtion was, whether by the words of this will the whole term did not veſt in *H.* and it was decreed, that it did not; for the words *die without iſſue*, have a twofold meaning, either without iſſue at the time of his death, or without iſſue whenever the iſſue fails; and though in caſe of an inheritance, if lands are deviſed to one, and if he die without iſſue, the firſt deviſee takes an eſtate-tail by implication, which ſhall go to his iſſue; and they ſhall take in a courſe of deſcent to all ſucceeding generations; but to make ſuch a conſtruction in the caſe of a term, which cannot come to the iſſue by deſcent, is unneceſſary, and therefore in ſuch caſe the other conſtruction of the words, which is moſt natural and obvious, ſhall take place; and it ſhall be intended only, if he die without iſſue living at the time of his death, and conſequently the dying without iſſue being confined within the compaſs of a life, hinders not the remainder over; but it may well take place by way of executory deviſe, according to the former reſolutions. Decreed *Paſc.* 1718. *Targett* and *Gant.*

(G) *Of Terms for Years, and incertain Intereſts by Deviſe.*

1. A MAN deviſed his land to his executors for payment of his debts, and after debts paid, the remainder over; and it was admitted clearly, that the remainder was good; but the queſtion was, what eſtate the executors had, for there being no particular eſtate limited, if an eſtate ſhould be adjudged for them for life, it might determine before they received ſufficient to anſwer the end of the deviſe; for on their death it would not go to their executors; and it was adjudged an incertain intereſt, which ſhould go from executor to executor for payment of debts. *Cro. Eliz.* 315. 8 *Co.* 96. 1 *Rol. Abr.* 829.

2. *A.* deviſes his lands to his executors, till his ſon comes of age, the profits to be imployed in the performance of his will; though the ſon dies before he be of age, yet the intereſt of the executors

executors continues till he might be of age, if he had lived; for ſince the intent of the deviſor governs in wills, it might deſtroy that, if the executors intereſt ceaſed at the death of the ſon; for it is reaſonable to believe, that the teſtator found on a computation, that the profits of the land, in that time, would anſwer his debts, *&c.* ſo that this is a good deviſe of the term, till the ſon would be twenty-one, though he die before. 1 *Chan. Ca.* 113. 3 *Co.* 20. *b. Boraſton's* caſe, S. P.

3. If a man deviſes land to his wife, till his ſon comes of age, to provide his children with neceſſaries; though the wife dies before the ſon comes of age, yet her intereſt does not determine by her death, becauſe it was not a matter of mere confidence, but ſhall go to her executors; but if the deviſe had been, that his land ſhould deſcend to his ſon, but that his wife ſhould have the full profits thereof, until the full age of his ſon, for his education; here is nothing deviſed to the wife but a mere confidence, that ſhe ſhall take the profits for the education of the ſon; and by the will ſhe is but in nature of a guardian or bailiff, for the benefit of the infant, which determines by her death. *Cro. Eliz.* 252. *Dyer* 210.

4. A man deviſed certain lands to his wife, till his ſon and heir apparent ſhould attain to his age of twenty-one years, and when his ſon ſhould attain to his age, then to his ſon and his heirs, and died; the ſon lived to the age of thirteen years, and then died; and the wife ſuppoſing that ſhe had a title to hold the lands till ſuch time as the ſon would have attained his age of twenty-one years, in caſe he had lived to that time, continues in the perception of the rents and profits of the ſaid lands for ſeveral years; and the bill was brought againſt her by the heir at law of the ſon, to have an account of the rents and profits from the death of the ſon; and though the wife was executrix likewiſe of her huſband, yet it not being deviſed during that time for payment of debts, nor any creditors, or want of aſſets appearing, it was held by Ld. Chan. that the wife's eſtate determined by the death of the ſon, and that the remainder veſted preſently in the ſon upon the teſtator's death, and was not to expect, till the contingency of his attaining his age of twenty-one years ſhould happen; for then in this caſe it never would have veſted, he dying before that age, and therefore decreed the wife to account for the profits from the time of the ſon's death; and upon a rehearing his lordſhip continued of the ſame opinion, and grounded himſelf on the diſtinctions taken in 3 *Co.* 19.* and 6 *Co.* 35.†. *Hil.* 1713. *Manſfield* and *Dugard.*

Gilb. Eq. Rep. 36, S. C. *in totidem Verbis* 2 *Bac. Abr.* 63. S. C.

* *Boraſton's* caſe.
† *Bp. of Bath's* caſe.

5. If a copyholder deviſes his land to *A.* and *B.* his two ſons, and to the heirs of their two bodies begotten, and wills that each of them ſhall enter at the age of twenty-one years, the executors ſhall not take the profits till they are both of full age; but he who comes of age firſt ſhall enter, and then the other when he comes of age, and they ſhall hold the land jointly. *Cro. Jac.* 259 *Yelv.* 183. *vide* 1 *Bulſt.* 48. *cont'.*

6. *A.* deviſed to *B.* during his exile; and if it pleaſe God to reſtore him to his country, or if he die, then to *J. S. B.* was a *Dutchman*, and had a penſion from the States; but upon ſome diſpleaſure the States deprived him of his employment and of his penſion, and gave them to another; whereupon he voluntarily left the country, and lived here with *A.* who had been his acquaintance beyond ſea; and after his coming hither, a war happened

between the *Dutch* and *Engliſh*, and afterwards a peace was concluded between the two nations; yet *B.* continued here, and whether his eſtate was determined was the queſtion; and the court held it was not, for that the exile intended by *A.* was the leaving his country, becauſe of the States diſpleaſure to him, and the withdrawing of his penſion upon that diſpleaſure. *Paget* and *Voſcius*, 2 *Lev.* 191.

7. *A.* deviſed his land to *B.* and *C.* and the ſurvivor of them, till 800*l.* ſhould be raiſed out of them; and it was adjudged that *B.* and *C.* ſhould have the land no longer than they might have received it out of the profits; and that if a ſtranger enters after the death of the deviſor, they may have an account of the mean profits, but cannot hold the land longer than the ſum might have been levied; for if that were allowed, they might make it an eternal charge on the heir's eſtate; but if the heir himſelf enters and diſturbs them, they may hold over, for the heir ſhall have no benefit of his own wrong, or they may have their action againſt him at their election. 4 *Co.* 82. *Corbet's* caſe, *Cro. Eliz.* 800. 1 *Salk.* 153, S. P.

Vid. for this head, 2 *Bac. Abr.* 66, 7, 8.

(H) *Of Deviſes by Implication.*

1. IF *A.* deviſes lands to his heir, after the death of his wife; this is a good deviſe to the wife for life by (*a*) implication; for by the expreſs words of the will the heir is not to have it during her life; and if the wife has it not, none elſe can, for the executors cannot intermeddle. 1 *Rol. Abr.* 843. 1 *Vern.* 22, S. P. 2 *Vern.* 572, S. P. 2 *Vent.* 223, S. P.

(*a*) The law in conveying of eſtates did not regularly ſuffer any to paſs by implication, becauſe it is a manner of transferring no way agreeable to the plainneſs and ſolemnity of the law: as if *A.* ſurrendered to the uſe of *D.* and *B.* and for want of iſſue to *B.* the remainder over to *C.* This in a conveyance at law had been but an eſtate for life to *B.* and no eſtate-tail by implication; but as there has been greater favour and latitude allowed in the diſpoſition of eſtates by will, and in the conſtruction of them, the judges, to ſupport the intent of the deviſor, where it was very apparent, have admitted eſtates by implication, though to the diſheriſon of the heir at law: but where ſuch eſtates ariſe, it muſt be by a neceſſary, and not a poſſible implication or intention in the deviſor; for the heir's title being plain and obvious, no words by conſtruction ſhall impeach it, which will bear a contrary ſignification. *Vaugh.* 263.

2. If a man deviſes to a ſtranger, after the death of his wife, this gives the wife no eſtate for life by implication; for it is but a demonſtration when the eſtate of the ſtranger ſhall commence. *Bro. Dev.* 52. *Cro. Jac.* 75. 1 *Vern.* 22. 2 *Vern.* 572. 2 *Vent.* 223.

3. If one having a wife and two daughters heirs at law, deviſes lands to one of the daughters after the wife's death; this gives the wife an eſtate for life, though the daughter was but one of the coheirs. 2 *Vern.* 723.

4. If a man poſſeſſed of a term for years, deviſes it to his ſon after the death of his wife, and the wife is made executrix, ſhe ſhall have the whole term as executrix; for there cannot be an eſtate for life of a term by implication, as there may be of an inheritance. *Moor* 635.

2 *Bacon's Abr.* 76.

5. *A.* ſeiſed of a manor, part in demeſnes, and part in ſervices, deviſed all the demeſnes to his wife expreſly for life, and all the ſervices for fifteen years; and then deviſed the whole manor to a ſtranger after her death; it was reſolved, that the laſt deviſe ſhould not take effect till after her death, and yet ſhe ſhould not have the ſervices for her life by implication, but that the heir ſhould enjoy the ſervices after the fifteen years, though ſhe were ſtill alive; for there appears no neceſſary implication

plication, that ſhe ſhould have the whole for her life, with an excluſion of the heir; and a poſſible implication is not ſufficient to exclude him; for nothing but the apparent intent of the deviſor can do that; but if the deviſor had ſaid, that after the death of his wife and the ſtranger, the heir ſhould have the manor, the wife by a neceſſary implication ſhall have the whole manor for her life; for the deviſor's intent is plain, that the heir is not to have the manor, while the ſtranger and the wife live, and the ſtranger cannot take any thing whilſt ſhe lives. *Moor, Pl.* 24. *Vaugh.* 365.

6. One having iſſue a ſon, who was his heir apparent, and two daughters, deviſes in theſe words; if it happen my ſon *B.* and my two daughters to die, without iſſue of their bodies lawfully begotten, then all my lands ſhall be and remain to my nephew *D.* and his heirs for ever, and dies; and it was held, *firſt*, that no expreſs eſtate was by this will given to his children; *2dly*, nor any eſtate by implication, becauſe then it muſt be either a joint eſtate for life, with ſeveral inheritances in tail, or ſeveral eſtates-tail in ſucceſſion one after another; the laſt it cannot be, becauſe incertain which ſhall take firſt, which next; and the firſt it ſhall not be, becauſe the heir at law ſhall not be diſinherited without a neceſſary implication, which in this caſe there is not, for it is only a deſignation and appointment of the time when the land ſhall come to the nephew; as if he had deviſed thus; I leave my land to deſcend, or I give my land to my ſon and his heirs, till he and my two daughters die without iſſue, or ſo long as any heirs of the body of him and my two daughters ſhall be living; and then, or for want of ſuch heirs, I deviſe the ſame to my nephew; this is good as a future and executory deviſe; and in the mean time the land ſhall deſcend to the heir at law, he having made no diſpoſition thereof. *Hil.* 21 & 22 *Car.* 2. *c.* 13. *Gardiner* and *Shelton*, *Vaugh.* 259.

1 *Freem.* 11, S. C. reſolved by three judges *contra. Tyrrell.* 2 *Bacon's Abr.* 67.

7. *A.* deviſes to *B.* and his heirs male, and if he dies without heirs of his body, then to remain to *C.* in fee; this is but an eſtate in tail male to *B.* for the law ſupplies the words *of his body*; and ſince the deviſor only gave it by expreſs words to him and his heirs male, it would be againſt his plain words, to let in iſſue female by implication on the other words, *viz. If he dies without heir of his body.* Dyer 171.

1 *Bulſt.* 63.

8. So if a man deviſes to *A.* and the heirs of his body; and if he die without heirs, theſe laſt words will not give the deviſee an eſtate in fee by implication. 2 *Vern.* 451. *Where an eſtate for life may be inlarged by implication*, vide *Letter* (D), *p.* 179.

(I) *Of Deviſes of Lands for Payment of Debts.*

For this head, *Vid.* 2 *Bacon's Abr.* 64. &c.

1. A MAN ſeiſed of copyhold lands ſurrenders them to the uſe of his will, and then by his will ſays, *my debts and legacies being firſt deducted, I deviſe all my eſtate, both real and perſonal, to* J. S. and it was held by Ld. Chan. that this ſhould amount to a deviſe to ſell for the (*a*) payment of debts. *Paſc.* 1682. *Newman* and *Johnſon*, 1 *Vern.* 45.

(*a*) Creditors are ſo far favoured in equity, that whenever it appears to be the teſtator's intent, that his lands ſhould be liable to his debts, equity will make them ſubject, though there are not expreſs words of charge; but *note*, that there muſt be ſomething more than a bare declaration, that his debts ſhould be paid, otherwiſe it ſhall be intended out of the perſonal eſtate, and the real will not be liable, as appears by the caſes on this head.

2. *A.* deviſed all his lands to *B.* and the heirs of his body; and in another part of his will, reciting that he owed *B.* money upon account, he therefore deviſed to him all his perſonal eſtate, and made him executor, willing him to pay his debts; and upon the reading of the will, though the clauſe as to the payment of debts ſeemed to relate to the perſonal eſtate only; and though the lands were deviſed to *B.* in tail, with a remainder over to another; and that it was objected, that a tenant in tail could not be a truſtee; yet the court decreed both real and perſonal eſtate to be ſold for payment of the teſtator's debts. *Mich.* 1686. *Clowdſly* and *Pellham*, 1 *Vern.* 411. 2 *Vern.* 229, S. C. cited, and the decree ſaid to be affirmed in the houſe of lords.

This is a ſtrong caſe. I queſtion if it would now be ſo decreed: *per Verney* maſter of the rolls, in the caſe of *Malliſon* and *Middleton*, *Aug.* 2, 1739.

3. But where a deviſe was in the following manner: *I will all my debts ſhall be paid before any of my legacies or gifts herein after mentioned*, and deviſes ſeveral pecuniary legacies; and after, in the ſame will, deviſes lands to *J. S.* on condition to pay a certain rent to *J. N.* and other lands to *J. S.* on condition to pay 5*l. per Ann.* to *J. D.* And the queſtion was, whether theſe lands were by the will ſubjected to the payment of the teſtator's debts, or only to the payment of the particular rents thereout deviſed; and the court held, that the lands were not ſubjected to the payment of the teſtator's debts, for the general clauſe in the beginning of the will ſhall be intended only of the perſonal eſtate, and the pecuniary legacies thereout deviſed. *Paſc.* 1687. *Eyles* and *Cary*, 1 Vern. 457.

4. If *J. S.* deviſes his lands to his brother, who is his heir at law in fee, and likewiſe deviſes ſeveral legacies, and makes his brother executor, deſiring him to ſee his will performed according to the truſt and confidence he had repoſed in him; this makes the real eſtate liable; for the teſtator needed not have deviſed the eſtate to his brother, being heir at law, unleſs he intended that he ſhould take them chargeable with the debts and legacies. Decreed *Paſc.* 1691. *Alcock* and *Sparhawk*, 2 *Vern.* 228. and affirmed in the houſe of lords.

5. *A.* deviſed in the following words: *I do by this my will diſpoſe of ſuch worldly eſtate as it hath pleaſed God to beſtow upon me*; firſt, *I will that all my debts be paid and diſcharged, and out of the remainder of my eſtate I give and bequeath unto my wife* 300l. *my mind and will is, that my wife have one moiety of what is left after my debts paid.* Item, *I give to my dear brother* R. B. *a cloſe lying in the pariſh of*———, *and for the remaining part of my eſtate, as well real as perſonal, I give and bequeath unto my brother* J. B. *whom I make executor*; and it was held clearly, that theſe words ſubjected his real eſtate to the payment of his debts. *Ibid.* 690. *Beachcroft* verſus *Beuchcroft.*

Prec. in Chan. 43, S. C. *in totidem Verbis.* *Gilb. Eq. Rep.* 111, S. C. *in totidem Verbis.* 2 *Vern.* 708, S. C. where it is ſaid, that ſome ſtreſs was laid on the word *deviſe.* 2 *Bac. Abr.* 65. 3 *P. Wms.* 91. 358. 2 *Vez.* 27. 569 4 *Br.* parl. cas. 90.

6. So where *A.* being ſeiſed of a real eſtate, and alſo poſſeſſed of ſome perſonal eſtate, made his will in writing, and thereby deviſed in theſe words: imprimis, *I will and deviſe that all my debts, legacies and funeral charges ſhall be paid and ſatisfied in the firſt place.* Item, *I give and deviſe*, and then proceeds to diſpoſe of his real and perſonal eſtate; the perſonal eſtate not being ſufficient, the queſtion was, whether that clauſe in this will ſhould amount to a charge on his real eſtate for the payment of his debts, legacies and funerals; and Ld. Chan. *Cowper* was clear of opinion that it ſhould; for as to his debts, it was but natural juſtice they ſhould be paid, and his perſonal eſtate would

would have been liable to the payment thereof, whether he had given any directions in his will about them, or not; when therefore he wills and deviſes that his debts, legacies and funerals ſhall be paid and ſatisfied in the firſt place, theſe words muſt be intended to give a preference for thoſe purpoſes to any other whatſoever; and ſince he does not deviſe his real or perſonal eſtate to any perſon in particular for theſe purpoſes, the perſons who come within that deſcription muſt be ſuppoſed to be within his view; and it muſt be taken as a deviſe for their benefit, preferable to any other diſpoſition whatſoever, either of his real or perſonal eſtate, and conſequently both of them are thereby made liable thereto: Decreed *Hil.* 1715. *Trott* and *Vernon.*

7. If lands are deviſed to truſtees for the payment of debts and legacies out of the rents and profits, the truſtees may ſell the land itſelf. 1 *Vern.* 104. 2 *Chan. Ca.* 105, S. P. decreed.

8. But if the deviſe be to pay debts and legacies out of the annual rents and profits, by theſe words the lands ſhall not be ſold. *Ibid.*

9. If there be a deviſe of a ſum certain, to be raiſed out of the profits of lands, and the profits will not amount to raiſe the ſum in a convenient time; *per* Ld. Chan. it is the law of this court to decree a ſale. *Ibid.* 256. 2 *Vent.* 357.

10. *A.* deviſes that his executors ſhall receive the rents, iſſues and profits of his perſonal eſtate, in the firſt place to pay 60*l.* *per ann.* to one for life, and after that perſon's death, out of the remainder of his eſtate, his debts being paid, to raiſe portions for ſeveral children, payable at twenty-one, and maintenance in the mean time, and deviſes all his lands in ſeveral parcels to ſeveral perſons at future times; and the maſter of the rolls held, that the lands were liable to be ſold, and that the ſales ſhould be out of all the deviſee's lands, unleſs the perſonal eſtate were ſufficient, or the rents and profits in a reaſonable time; and ordered an account to be taken thereof in the firſt place. *Trin.* 1687. *Berry* and *Aſkam*, 2 *Vern.* 26. His real and perſonal eſtate. *Vid.* 2 *Vern.* 26.

(K) *Of Deviſes of Things Perſonal; as Goods, Chattels, &c. by what Deſcription, and to whom good.*

For this head, *Vid.* 2 *Bac. Abr.* 68. &c.

1. IF a man who has debts due to him by bond, and who is likewiſe poſſeſſed of a term for years, deviſes one moiety of his perſonal eſtate to his wife, and afterwards ſeveral legacies to other perſons, and the reſidue to *J. S.* The wife ſhall have one compleat moiety, if the other is ſufficient to pay the debts, and ſhe ſhall have a moiety of the leaſe; though it was objected, that a leaſe was not uſually reckoned perſonal eſtate. *Lee* and *Hale*, 1 *Chan. Ca.* 16. 2 *Freem.* 157. S. C.

2. If a man poſſeſſed of a leaſe for years, bequeaths ſeveral legacies of plate and other goods to ſeveral perſons, and after deviſes all the reſidue of his goods to his wife, his debts and legacies being paid, and makes her ſole executrix; by this will the leaſe paſſes to her as legatee; for though by a grant of *omnia bona*, a leaſe paſſes not, yet by the civil law *bona* including all chattels, and this being a legacy, the judges of the common law in this caſe ought to be guided by that law. *Cro. Eliz.* 387.

3. If a man deviſes 1200*l.* to *J. S.* and by general words deviſes all his goods, chattles and houſhold ſtuff in and about his

houſe

houſe to the ſaid *J. S.* money in the houſe will not paſs, he having a particular legacy deviſed to him. 2 *Chan. Rep.* 190.

4. Plate and jewels will not paſs by a deviſe of utenſils. *Dyer.* 59.

(*a*) *Vide* the caſe of *Jeſſon* and *Eſſington.*—

5. But by a deviſe of houſhold goods, plate will paſs (*a*). 2 *Vern.* 638.

Budgden and *Elliſon*, and *Nichols* and *Oſborn*, *Eq. Ca. Abr.* part 2. S. P.

Cited in *Style.* 289.

6. If a nobleman poſſeſſed of a collar of SS, and of a garter of gold, and a buckle annexed to his bonnet, and of many other buttons of gold and precious ſtones annexed to his robes, and of many other chains, bracelets, and rings of gold, and precious ſtones, deviſes all his jewels to his wife, and dies; the garter and collar of SS paſs not, becauſe they are not properly jewels, but enſigns of honour and ſtate; and the buckle in his bonnet, and the buttons paſs not, becauſe annexed to his robes; but all the other chains, rings, bracelets and jewels paſs. *Earl of Northumberland's* caſe, upon a reference to *Wray* and *Anderſon* C. J. *Owen* 124.

Prec. in Chan. 251, S. C. *in totidem Verbis.*

7. *J. S.* by will deviſes thus; *Item*, my will and pleaſure is, that the furniture and pictures in my houſes at *A. B.* and *C.* ſhall always remain there, and not in the power of my executors to diſpoſe of, but ſhall go, with my ſaid houſes, to ſuch of my grandchildren as ſhall be in the poſſeſſion thereof; and then appoints that the plate gilt with gold belonging to his chapel at——, together with the ornaments thereof, ſhould remain to the perpetual uſe of the ſaid chapel, and makes *D.* executor; to whom he gives all his perſonal eſtate, except what is before bequeathed, of what nature or kind ſoever, for his own proper uſe; and the queſtion was, if the plate the teſtator conſtantly uſed, and removed with him, when he went from one houſe to another, ſhould go to the executor by the laſt clauſe, or belong to the houſes, under the word *Furniture*; and *Wright* Ld. K. was of opinion, that *Furniture* in a large ſenſe takes in plate, but not here, becauſe he diſtinguiſhes the chapel plate from the furniture; and the plate of ordinary uſe, that was carried with him, could no more be ſaid the furniture of one houſe then of the others, and he meant only the particular furniture of each houſe; ſo the plate went to his executors, and liable to the plaintiffs, who were creditors. *Mich.* 1705. *Franklin* and *Earl of Burlington*; *vide* 2 *Vern.* 512, S. C. where it is ſaid to have been *adjudged*, that the *plate paſſed by the deviſe of his furniture and pictures.* Sed quære.

8. If a man deviſes his houſe, and all his goods and furniture therein, to his wife for life, and after her deceaſe to his ſon *R.* and his heirs, except his pictures, which he gives to his ſons *A.* and *B.* and he has pictures in boxes, as well as thoſe hung up in the houſe, and likewiſe pictures at his death, which he had not at the time of the making the will; and it is proved in the cauſe, that he had ſkill in pictures, and frequently bought pictures, and ſold them again; the exception of the pictures ſhall extend, as well to the pictures hung up as furniture, as well to thoſe in the houſe at the time of the will, as to thoſe bought in after the will made; ſo that they ſhall paſs to his ſons *A.* and *B. per* Ld. K. *Hil.* 1705. *Gayre* and *Gayre*, 2 *Vern.* 538.

Prec. in Chan. 392, S. C. *Gilb. Eq. Rep.* 87, S. C. *in totidem Verbis* with *Prec. in Chan.*

9. If a man deviſes to his wife all his perſonal eſtate at a place

Vide Maſters and *Maſters*, S. P. *Eq. Ca. Abr.* part 2. *Gilb. Chanc.* 328.

ce called *W.* all his perſonal eſtate, as coaches, horſes, &c. re at the time of his death ſhall paſs, though not there at making of the will, the perſonal eſtate being fluctuating l varying until the time of the teſtator's death. *Mich.* 1714. *er* and *Sayer*, 2 *Vern.* 688. *per curiam*; *vide Swinb.* 418.

10. But if *J. S.* deviſes all his houſhold goods and furniture, ich ſhould be in his houſe at *R.* at his death, to his wife, l afterwards going beyond ſea, his ſteward gets the head dlord of the houſe to accept of a ſurrender of the leaſe of the uſe, and removes the goods to another houſe, and writes an count of this to *J. S.* who approves of it; the goods will not s by the will to the wife; otherwiſe, if they had been noved by fraud to defeat the legacy, or by any tortious act, thout the privity of the teſtator: Decreed *Hil.* 1716. *Earl* and *ntes of Shaftſbury*, 2 *Vern.* 747.

2 *Chanc. Rep.* S. C. 190. 3 *P. Wms.* 112. 2 *Atk.* 103. *Brown's Rep.* (reſpecting a bond) 127 *Prec. Cha.* 8.

11. So if a man deviſes to his ſon the furniture of his houſe *D.* and two years afterwards orders goods which he had ught in *London*, to be carried to his houſe at *D.* and agrees th carriers for that purpoſe, but dies before the goods are noved from *London*; theſe goods ſhall not paſs by the will, as rt of the furniture of the houſe at *D.* Decreed *Hil.* 1716. *ke of Beauford* and *Lord Dundonald*, *Ibid.* 739.

This caſe ſeems contingent to the ſpirit of the deciſions in the civil law in this point. *Vide* 2 *Strahan's Domat.* 156. liv.

* 12. A man deviſed all the arrears now due, and unjuſtly tained from me by the dean and chapter of *York*, to be emoyed in a certain charity; and the queſtion was, whether the rears incurred after the making of the will, and a ſmall time fore the death of the teſtator, and which were never deanded by the teſtator, ſhould paſs; and *per* Ld. K. not; for ough a general deviſe of all a man's goods will carry all he d at his death, though purchaſed after the making his will; t here it is confined to the arrears due at the making the ill: Decreed *Trin.* 1701. *Attorney General* and *Bury*.

* 13. If a man deviſes his ſilver tea-kettle and lamp, with e appurtenances, nothing ſhall paſs but the kettle and mp, and the box wherein the lamp was placed, and not the lver tea-pot, milk-pot, tongs, ſtrainer, or caniſters: Reſolved the rolls, *Mich.* 1728, in a caſe between *Hunt* and *Eerkley*.

* 14. A man deviſed to his niece all his goods, chattels, ouſehold-ſtuff, furniture, and other things which then were, ſhould be in his houſe at the time of his death, and ſome me after died, leaving about 265*l.* in ready money in the ouſe; and it was decreed, that this ready money did not aſs; for by the words *other things* ſhall be intended things of ke nature and ſpecies with thoſe before-mentioned. *Mich.* 729. *Trafford* and *Berrige*.

15. If a man deviſes 40*l.* to be paid *J. S.* by him to be diſpoſed of in ſuch manner as the teſtator ſhould by a private ote acquaint him with, and dies without ſuch appointment; is is a good bequeſt to the party: Decreed *Paſc.* 20 *Car.* 2. *artin* and *Clerk*, 2 *Chan. Ca.* 198.

16. If one deviſes his lands to *B.* in fee, paying 400*l.* whereof ool. to be at the diſpoſal of his wife, by her laſt will, to whom e ſhall think fit; and the wife dies inteſtate, her adminiſtra- r ſhall have this 200*l.* the property thereof being abſolutely ſted in the wife: Decreed *Mich.* 1690. *Robinſon* and *Duſgale*, *Vern.* 181.

S. P. 2 *Jon.* 261.

17. If

17. If one deviſes his lands for the payment of his debts and legacies, and deviſes 400*l.* a-piece to two of his ſiſters, and t his third as much as his executor ſhould think fit; the third ſhall have 400*l.* alſo, and be made equal to her other ſiſters, i the eſtate will hold out: Decreed *Trin.* 1690. *Warcham* an *Brown*, 2 *Vern.* 153.

Nelſ. Chanc. Rep. S. P. 93, & 188. 2 *Freem.* 158. *Bretton* and *Bretten*, S. C. and P. ſays, the like caſe was adjudged ſo by the maſter of the rolls, *inter Mead* and *Cane & al'*, *July* 16, 1663. 1 *Chan. Rep.* 1 *Mead* and *Cave*, S. C. and P. accordingly.

18. If money is deviſed to younger children, where ther are divers daughters and a ſon, who by birth is a younger child but is heir at law to a fair inheritance, he ſhall not be conſi dered as a younger child, ſo as to take by the deviſe. 12 *Car.* 2 *Bretton* and *Bretton*, 3 *Chan. Rep.* 1.

19. If a man deviſes lands to be ſold for the increaſe of chil drens portions, a child born ſince the will ſhall have a ſhare 2 *Chan. Rep.* 211.

20. So where one deviſed 20*l.* a-piece to all the children o his ſiſter *B.* and the queſtion was, whether a child born afte the making of the will, and before the death of the teſtato ſhould take by virtue of the deviſe; and the court decreed it t extend to the after-born child; the word *children* compre hending all. *Trin.* 1689. *Garbland* and *Mayot* (*a*), 2 *Vern.* 10 but if it had been to the children by name, *quære*, & *vide* Dy 177. 1 *Inſt.* 112. *b.*

(*a*) 2 *Freem. Rep.* 105, S. C. cited under the name of *Garberend* and *Garberend.*

21. A man by will deviſed all his goods in ſuch a houſe t *G.* for life, and after his deceaſe to the heir of *J. S.* and th point was, whether he that was heir of *J. S.* ſhould take the goods as deviſee, and the ſaid goods go to his executors; a though ſuch heir die in the life-time of *G.* or whether he tha was heir to *J. S.* at the time of *G*'s death, ſhould have them and though it was urged that theſe goods were only the furni ture of the capital houſe, yet Ld. Chan. was of opinion, tha they abſolutely veſted in him that was heir of *J. S.* at the tim of his death; and decreed accordingly. *Danvers* and *Earl Clarendon*, 1 *Vern.* 35.

22. A man deviſed his eſtate to his wife for life, and afte her deceaſe to his ſon *T.* his heirs and aſſigns for ever; provide if *T.* died without iſſue of his body, then he bequeathed unt his daughters (*b*) *M.* and *E.* 200*l.* to be equally divided betwee them, and to be paid out of his eſtate within ſix months afte the deceaſe of the ſurvivor of the wife and ſon; the wife die and *T.* died, leaving iſſue, who died within three months afte the father; and lord *Harcourt* held, that this perſonal legac could not be intended to ariſe upon any remoter contingency than that of *T.*'s dying without iſſue living at his death; an therefore diſmiſſed the bill, which ſought the benefit of it. *Tri* 1712. *Nichols* and *Hooper*, 2 *Vern.* 686.

(*b*) 1 *Will. Rep.* 198, S. C. *Eaſter* 1712. ſays, nieces, and that in default of payment the teſtator deviſed the lands to the legatees for payment: but as to this it was held, that with reſpect to the legatees, if the legacies take any effect, the words of the will paſs a legal intereſt, a the court does not hinder the plaintiffs from proceeding at law in an ejectment, but diſmiſ the bill.

23. If *A.* deviſes 1500*l.* in truſt for the children of *B.* and has only one child, and ſeveral grandchildren, the child onl ſhall take, and the grandchildren ſhall not come in for ſhares but if *B.* had not a child living, the grandchildren might hav taken by the name of children. *Vide* 2 *Vern.* 106.

24. If a man deviſes the ſurplus of his eſtate to his grand children living at his death, *grandchildren born after his deceaſ*

ll not take (a); for if he had ſo intended it, he would not ve reſtrained it to children living at his death: Decreed *Hil.* 715. *Muſgrave* and *Parry*, 2 *Vern.* 710.

25. If one deviſes the ſurplus of his perſonal eſtate to the ildren of *A.* and *B.* and neither of them has a child at the aking of the will, or the death of the teſtator, the deviſe is ecutory, and ſhall extend to any children that *A.* and *B.* ſhall terwards have, and the children of each ſhall take *per capita*, d not *per ſtirpes*; they claiming in their own right, and not repreſenting their parents; *per Cur'. Mich.* 1715. *Weld* and *adbury*, *Ibid.* (705) 2 *Vern.* 705.

26. The duke of *Bolton* by his will deviſed in theſe words, iz. item, *I give and bequeath unto ſuch of my ſervants, as ſhall living with me at the time of my death, one year's wages, per* d. K. ſtewards of courts, and ſuch who are not obliged to ſpend eir whole time with their maſter, but may alſo ſerve any ther maſter, are not ſervants within the intention of the will; t I will not narrow it to ſuch ſervants only that lived in the ſtator's houſe, or had diet from him. 2 *Vern.* 546, 547. *wnſhend* & *al'. V. Windham* & *al'.*

(a) *Vide contra* in *Northey* and *Strange*, *Eq. Ca. Abr.* pt. 2. I can find nothing to the cont. in *Northey* and *Strange*, either in 2 *Eq. Abr.* 264. pl. 8, 9, or 1 *Will. Rep.* 340—342. all that is there ſaid, is that a deviſe to the teſtator's grandchildren would only extend to ſuch as were born in the life of the teſtator, but, had it been to his grandchildren living at his death, this

uld extend to any grandchild of whom the mother had been enſeint in the life of the teſtator: is is indeed cont. to the original in *Vernon*, but not at all to the caſe as here abridged, "as ldren born after his deceaſe" are words too general to extend to children in embryo only, d may mean ſuch as are born ten years after, who certainly cannot take, and which is a point t contradicted in *Northey* and *Strange*.

(L) *When a Deviſe ſhall be in Satisfaction of a Thing due.*

Vide for this head, 3 *Bac. Abr.* 472.

F. S. upon his wife's joining with him in the ſale of part of her jointure, gave a note to pay her 7*l.* 10*s. per. Ann.* r her life; and upon a ſecond ſale of a farther part of her join- re, gave her a bond to pay her 6*l.* 10*s. per Ann.* for her life; nd afterwards by will, without taking notice either of bond or ote, deviſed unto her 14*l. per Ann.* for life; and it was held, hat the deviſe ſhould be in lieu and ſatisfaction of the bond and ote. *Paſc.* 1705. *Brown* and *Dawſon*, 2 *Vern.* 498. *per cur'.*

Prec. in Chan. 240, S. C. mentions two notes and held the deviſe a ſatisfaction of both.

2. So if *A.* by marriage articles agrees to leave his wife 800*l.* nd her jewels, &c. but it is declared, that notwithſtanding the rticles, ſhe ſhould not be debarred of any thing he ſhould give er by will; and *A.* by will makes a diſpoſition of his whole ſtate among his children, &c. and gives his wife 1000*l.* the ife muſt wave the articles or the will, for ſhe cannot have oth; for his making a diſpoſition of the whole eſtate ſhews, hat he intended that every part ſhould be performed. *Paſc.* 706. *Lady Herne* and *Herne*, 2 *Vern.* 555.

3 But if *A.* gives a bond to *B.* her ſervant, to pay her 20*l.* r *Ann.* quarterly for her life, free from taxes; and by will, ithout taking notice of the bond, gives *B.* 20*l. per Ann.* for her ſe payable half yearly, but not ſaid free of taxes; *B.* ſhall ave both the annuities, for that by the will not being ſo ad- ntageous as the firſt, cannot be preſumed a ſatisfaction: De- reed *Hil.* 1704. *Atkinſon* and *Webb*, *Ibid.* 478.

1 *P. Wms.* 408. 2 *P. Wms.* 343. 553. 1 *Vez.* 263. 519. 2 *Atk.* 300. 49. 3 *Atk.* 96. *Browne's Rep.* 170. *Prec. in Chan.* 236, S. C. Decreed that *B.*

ould have both the annuities; for that given by the will was not ſo advantageous to her as the ſer, in reſpect of the times of payment, of the difference of the places, and of the one ing free from, and the other (on the land) liable to taxes.

4. So where *A.* on his marriage covenanted to purchaſe, and ettle a jointure of 20*l. per Ann.* on his intended wife; and if he ied before ſuch purchaſe or ſettlement made, ſhe ſhould have

300*l.*

300*l.* out of his eſtate for her own uſe; the marriage was ha and the huſband died before any ſuch ſettlement was made but by his will he deviſed to his wife 330*l.* for her life, wi power to diſpoſe of 30*l.* part thereof, at her death; and it w held, *firſt*, that ſhe had a right to 300*l.* and intereſt, and th the executor could not now be at liberty to ſettle 20*l.* *per An* as the teſtator might have done: *2dly*, that ſhe ſhould ha the 330*l.* as an additional bounty, and proviſion for the wife Decreed *Trin.* 1705. *Perry* and *Perry*, 2 *Vern.* 505.

Prec. in Chan. 214.

5. By a marriage-ſettlement the intended huſband was ma tenant in tail, and a proviſion was made of 3000*l.* a-piece f the daughters; the huſband afterwards docked the intail, an deviſed to the daughters 3000*l.* a-piece; and it being prove that the teſtator had declared, after making the ſettlemen that he would add to his daughters portions; and it bein urged, that the cutting off the intail was for this purpoſe, t court decreed the daughters both ſums. 13 *Car.* 2. *Pile* a *Pile*, 1 *Chan. Rep.* 199.

Vide 2 *Freem. Rep.* 185. Mem. the firſt points menticned here to be de creed with reſpect to the father's will, ſeems in *Vern.* to be only the arguments of the daughter's counſel, and the court ſeems to have there ſaid nothing as to that point, perhaps as they thought the other point (as to the brother's will) ſo clear, that this need not be inſiſted on:—It ſeems not to be a good objection to the father's

6. By a marriage-ſettlement, in caſe of failure of iſſue ma a remainder of the eſtate was limited to daughters, until the ſhould raiſe 3000*l.* for portions; there was iſſue of the marria a ſon and two daughters; the father deviſed 700*l.* a-piece the daughters, and died; the ſon afterwards made his wi and deviſed to the daughters to the amount of 7000*l.* witho mentioning of its being in lieu or ſatisfaction of any thing d to them, and gave his land to his heirs male, and died witho iſſue; and it was held clearly, that the father's legacy cou be no ſatisfaction, not being adequate in value; beſides the f ther had then a ſon living, and it was altogether contingent a uncertain, whether 3000*l.* would ever ariſe, and become pa able or not; and therefore it was but reaſonable, that the fath ſhould make ſome certain proviſion for his daughters; but to the ſons legacy of 7000*l.* it was, by two lords commiſſione againſt *Rawlinſon*, decreed a ſatisfaction; but upon an appe to the lords, the decree was reverſed; for the daughters bei heirs at law, and diſinherited, there was no ground for t court to make a ſtrained conſtruction to their prejudice, in f vour of a voluntary deviſee. *Paſc.* 1692. *Duffield* and *Smi* 2 *Vern.* 258.

deviſe being in any degree a ſatisfaction, that it was not adequate to the portions, part ſatisfaction, as was decreed in a ſimilar caſe of *Jeſſon* and *Jeſſon*, 2 *Ver* 255. which laſt caſe ſeems much ſtronger for the daughters than the principal caſe, except th the daughters in this caſe were heirs at law, and yet there, this point was decreed againſt the

7. *A.* on the marriage of his daughter, gave a bond to t huſband for the daughter's portion, and afterwards by will d viſed land of much greater value to the huſband and wife, an their heirs and died; and there being a defect of aſſets to pa debts the queſtion was, whether the deviſe of thoſe lands ſhou be a ſatisfaction; and the court held that caſes of this natu depend upon circumſtances; and that where a legacy has bee decreed to go in ſatisfaction of a debt, it was grounded upo ſome evidence, or at leaſt a ſtrong preſumption, that the te tator did ſo intend it; but there is no room for that in this caſ it plainly appearing the teſtator intended to give all he cou to his ſon-in-law and daughter, and defraud his creditors; an therefore the deviſe of the land muſt not be in ſatisfaction of t bond debt. *Trin.* 1693. *Goodfellow* and *Burchett*, *Ibid.* 298.

It is a rule that a deviſe of lands ſhall be no ſatisfaction for money, nor vice verſa. 3 *Will Rep.* 245. & *Vid.* this caſe cited in 3 *Will. Rep.* 226, 7.

8. *B*

8. *H.* owed his niece *A.* 100*l.* by bond, and having two her nieces *B.* and *C.* makes his will, and bequeaths 300*l.* to his ce *A.* and to his other two nieces 200*l.* a-piece; after that he rrowed another 100*l.* of his niece *A.* and being indebted to r 200*l.* died; and to prove that the 300*l.* ſhould go in ſatis-ction of the debt, it was inſiſted upon as a rule in equity, t where the teſtator being indebted, gives his debtee a lega- greater than his debt, it ſhall go in ſatisfaction; for a man ll be intended to be juſt before he is kind; otherwiſe where egacy is leſs, for that is neither to be juſt nor kind, and ſhall be taken to go in ſatisfaction of any part. But per *Cowper* ancellor, it might be as good equity to conſtrue him to be h juſt and kind, if he intended to be both; that if any part this 300*l.* be applied to the payment of the debt, as for ſo ch it is not a gift; whereas a legacy muſt be taken to be a t or gratuity; and there being aſſets, and ſome proofs of the ator's greater kindneſs to *A.* than to his other nieces, his lord-ip decreed her the whole 300*l.* over and above her debt. ch. 6 *Ann.* between *Cuthbert* and *Peacock*, 1 *Salk.* 155. *Vide* 2 lk. 508. *Cranmer's* caſe, where lord *Harcourt* reverſed a decree the maſter of the rolls, upon the circumſtances of the caſe, d intention of the party; that the legacy though greater, uld not be a ſatisfaction for what is due to the debtee. 2 *Vern.* 593. S. C.

9. *A.* by will gave ſix ſeveral annuities for lives, three of l. each, and three of 5*l.* each, to be paid out of his perſonal ate, and gave all the reſt of his real and perſonal eſtate to *E.* wife, whom he made ſole executrix; the annuitants were ſiſters, and their children; and about two years after, the ſe makes her will, and gives two annuities of 5*l.* each to two the 5*l.* a year annuitants in her huſband's will, but gives them them and their heirs, in caſe they happen to over-live ſuch a e, who by her huſband's will had 10*l.* *per ann.* for life; ſhe ewiſe gives another annuity of 10*l.* *per ann.* to one and her irs, and another of 5*l.* *per ann.* to another and her heirs, who d each of them the like annuities for life by the huſband's ll: but in the diſpoſition of theſe annuities, ſhe takes no nner of notice of her huſband's will, or that they had any nuities thereby given them; and the only queſtion was, ether the four annuities given to the perſons in fee by the ſe's will, ſhould be taken to be only in ſatisfaction of the e annuities for life, given to the ſame perſons by the huſ-nd's will; and it was argued that they ſhould; becauſe the ſband's annuities being payable only out of his perſonal ate, and the wife being his executrix, ſhe was in the nature a debtor for them; and where-ever a perſon by his will gives egacy, as great or greater than the debt he owes to the atee, it has been always taken to be a ſatisfaction of the t; but *per* Lord Chancellor, this doctrine has already been ried too far, and he would never carry it farther; for ugh it is true, a man ought to be juſt before he is bounti- and therefore ſhall be preſumed to pay a debt, rather n give a legacy to the ſame perſon, when it is the ſame n, or more than he owes him; yet why may he not be both t and bountiful, when there are aſſets to anſwer both; as in preſent caſe; and there can be no pretence to ſay, that the o firſt annuities of 5*l.* each can be a ſatisfaction of the like nuities given by the huſband, becauſe they are given upon 3 *Bac. Abr.* 475.

the

the contingency of over-living ſuch a one; which has not y happened, and poſſibly never may; and then ſhall the annu ties for life which are certain, be extinguiſhed, by giving th ſame perſons annuities in fee on a contingency which may n ver happen? and if that be ſo, as to theſe annuities, there no reaſon to imagine the wife had a different intention as the others, or that ſhe intended two of them ſhould go in ſati faction of the like annuities given by her huſband, and th other two not; and the caſes where a legacy has been held be a ſatisfaction of a debt, are, where the debt was owing t the ſame perſon who gave the legacy; but if ſuch legacy b given upon a contingency, or to take place at a future day, is no ſatisfaction of the debt; and therefore in the principal ca it was decreed, that the annuities given by the wife were di tinct additional annuities, and not an enlargement only of t huſband's annuities, from an intereſt for life to an intereſt fee, as it was urged to be, and therefore ſhould go in ſati faction of thoſe annuities; which the court held they ſhou not; but that the annuitants ſhould take both. *Trin.* 17 *Crompton and Sale, at my Lord Chancellor's.*

For this head, *Vid.* 2 *Bac. Abr.* 79, &c.

(M) *Of void Deviſes.*

1*ſt*, By deviſing what the law already gives, or what t policy of the law will not admit.
2*dly*, By incertainty in the deſcription of the thing deviſed.
3*dly*, By incertainty in the deſcription of the perſon to tak
4*thly*, By the deviſee of lands dying in the life-time of t deviſor.

1ſt, *By Deviſing what the Law already gives, or what the Poli of the Law will not admit.*

1. IF a deviſe be made to *J. S.* and his heirs, who is heir law to the deviſor; this is a void deviſe, and the he ſhall take by deſcent as his better title, for the deſcent ſtreng ens his title, by taking away the entry of ſuch as may poſſib have right to the eſtate; whereas if he claims only by devi he is in by purchaſe. 1 *Rol. Abr.* 626. *Hob.* 30. *Plowd.* 54 *Godb.* 461.

2. So if a man deviſes lands to his wife for life, remaind to *J. S.* who is heir at law in fee, this is a void deviſe to *J.* becauſe, after the diſpoſition of the particular eſtate, the r verſion would have gone without any farther diſpoſition in t ſame manner it is now limited by the will. 2 *Leon.* 10 1 *Rol. Abr.* 626. *Hob.* 30.

3. *A.* ſeiſed of lands on the part of his mother, deviſes the to his executors for ſixteen years, for payment of his deb and after deviſes them to his heirs at law *ex parte Materna*; t is a void deviſe to the heir at law; for tho' it was urged ſupport the deviſe, that if it obtained, the heir of the part the father might in the end inherit, which he could never if the deviſe be rejected; yet the court adjudged the dev void, becauſe this is no alteration made in the tenure of t eſtate, nor is the quality thereof any way altered; but whet the deviſee taketh by the will, or by deſcent, it is a fee-simp and it were but *actum agere* to make him take by will. *Hed* and *Rowe*, 3 *Lev.* 127.

4. But where another eſtate is created by the will, than wou deſce

ſcend to the heir at law, or where the quality of the eſtate altered by the deviſe, there the diſpoſition of the will ſhall revail tho' it be made to the heir at law. *Moor* 680. *Godol.* 61. 1 *Rol. Abr.* 610. *Hob.* 30.

5. As where a man had iſſue a ſon and a daughter, and deſed that his land ſhould deſcend to his ſon, and if he died ithout iſſue of his body, then the land to go over, *&c.* the n by this deviſe took an eſtate-tail, though heir at law to the eviſor, becauſe here is an eſtate-tail created by the will, and e heir muſt claim under the will, or the remainder will be oid. *Hob.* 30. 1 *Rol. Abr.* 610.

6. So where a man has iſſue only three daughters, and deſes his land to them and their heirs, this is a deviſe to the eir at law, and yet good, becauſe the deviſe makes them joinnants, in which ſurvivorſhip takes place; whereas had they ken by deſcent, they had been copartners; and the will alterg the generality of the eſtate ought to prevail. 3 *Lev.* 128.

7. If a man deviſes land in fee to *A.* and if he dies without eirs, then *M.* ſhall have it, the ſecond deviſe is void, for a e cannot depend on a fee; for no man can ſay when the heirs f *A.* will fail, and to allow the remainder to *M.* good, upon ch a diſtant contingency, is to perpetuate the eſtate in the faily of *A.* and yet preſerve a remainder or intereſt in *M.* which ry poſſibly may never veſt; and as theſe eſtates are unalienae, though all mankind joined in the ſale; therefore the reaon and policy of the law will not ſuffer them to have a longer uration than a life or lives *in eſſe*, and wearing out together, the term of twenty or thirty years: But for this *vide* letter (F).

Otherwiſe if *M.* was brother, &c. to *A.* then the remainder would be good; *A.* taking but an eſtate-tail. *Ante.* 130. pl. 11, 12.

8. *A.* deviſed his manors, meſſuages, *&c.* to the *drapers com-* 1 *Will. Rep.* 332. S. C. *Prec. in Chan.* 455, S. C. *Gilb. Eq. Rep.* 128. S. C. *in totidem Verbis* with *Prec. in Chan.* 3 *Burr.* 632. 2 *Vez.* 568. *Fearne Cont. Rem.* 392. S. C.
ny and their ſucceſſors, upon truſt, to convey to *B.* for life, nd to his firſt ſon, and all other his ſons for life, and to their ſſue male for life, and for want of ſuch iſſue, to *J. S.* for life, nd to his iſſue male for life, *&c.* and ſo to a great number of em for life; and ſo to convey *toties quoties*; and the court held is attempt to make a perpetual ſucceſſion of eſtates for life be vain and impracticable; however, that there ought to be ſtrict ſettlement made, and the intent of the teſtator followd, as far as the rules of law will admit of; and therefore diected a ſettlement to be made ſo, that ſuch who were in beg ſhould be only tenants for life; but where the limitation as to a ſon not in being, there he muſt be made tenant in tail ale. *Hil.* 1716. *Humerſton* and *Humerſton*, 2 *Vern.* 737.

* 9. *A.* deviſed all the reſt of his perſonal eſtate by leaſes, in uſt, or otherwiſe, to his three nephews, *A. B.* and *C.* and akes them executors, and wills, that they ſhall give bond to ch other, that in caſe either die without iſſue of his body, to ave at their death all the ſaid chattles and perſonal eſtate to e ſurvivors and ſurvivor of them; and the bill was to have e ſaid bonds given, but was diſmiſs'd, being an *attempt to inil a perſonalty.* (*a*) *Trin.* 1703. *Williams* and *Williams.*

(*a*) A perſonal eſtate cannot be intailed. *Vide* the caſe of *Seale* and *Seale*, *Eq. Ca. Abr.* part 2.

adly, *By Incertainty in the Deſcription of the Thing deviſed.*

1. If a man being ſeiſed of lands within a borough where nds by cuſtom are deviſeable by parol, deviſes in theſe words; *give all to my mother, all to my mother*; the lands paſs not, for the

the words are too (*a*) uncertain, and not ſufficient to diſinherit an heir. *Bowman* and *Milbank*, 1 *Lev.* 130.

(*a*) Deviſes are void and rejected where the words of the will are ſo general and uncertain, that the teſtator's meaning cannot be collected from them; according to that rule; as the heir at law has a plain and uncontroverted title, unleſs the anceſtor diſinherits him, it were ſevere and unreaſonable to ſet him aſide unleſs ſuch intent of the teſtator is evident from the will, for that were to ſet up and prefer a dark, or at leaſt a doubtful title, to a clear and certain one; but as it is likewiſe a rule in the conſtruction of wills not to reject any words in the will which can have a ſignification; theſe two have been the occaſion of ſeveral doubts and reſolutions concerning the intention of the teſtator, about the diſpoſing of his eſtate, whether he meant his real or perſonal, or what part of either of which he intended to paſs by the words of the will.

2. If one having lands in fee, and other lands for years, deviſes all his lands and tenements, the fee-ſimple lands only paſs; but if a man had leaſes for years only, and no fee-ſimple lands, by the deviſe of all his lands and tenements, the leaſes for years paſs; for otherwiſe the will ſhould be merely void. *Cro. Car.* 293. *per curiam.* Qu.

3. So if a man being ſeiſed of a meſſuage in *A.* and of a meſſuage and ſeveral lands in *B.* deviſes to *J. S.* his houſe in *A.* with all other his lands, meadows, paſtures, with all and ſingular their appurtenances whatſoever in *B.* yet the houſe in *B.* ſhall not paſs; for though by a feoffment or leaſe of lands in *D.* houſes will paſs, becauſe to be taken moſt ſtrongly againſt the feoffor, *&c.* and the land paſſing, the houſe thereupon muſt alſo paſs; yet wills are to be taken according to the intention of the deviſor; and when he deviſes his houſe in *A.* and lands in *B.* it cannot be preſumed that he would have more paſs than by the words is expreſſed. 2 *And.* 123. Qu.

4. If a man is ſeiſed of lands in a vill, and in *A.* and *B.* two hamlets within the ſame vill, and deviſes all his lands in the vill, and in *A.* and dies, no part of the land in *B.* ſhall paſs; for his naming one hamlet only, fully ſhews his intent, that the lands in the other ſhould not paſs. *Dyer* 261.

5. But where a man having two ſeveral moieties of lands by purchaſe of the ſame perſon, one lying in *Kent*; and the other in *Eſſex*, and he deviſed all his moieties in *Kent*; and it was held that both paſſed; for the words being, *all his moieties*, they cannot be ſatisfied with one moiety only. 1 *Bulſt.* 117. 2 *Bulſt.* 176. *Hob.* 173. *vide Noy* 112. *Cro. Eliz.* 658. Qu.

6. If one ſeiſed of lands called *Hayes-land*, lying in two vills, *viz. A.* and *B.* deviſes all his land in *A.* called *Hayes-land*, to his youngeſt ſon and his heirs, and in another part wills, that if his ſaid ſon dies without iſſue, that his wife ſhall have *Hayes-land*, and dies; and the ſon dies without iſſue, the wife ſhall only have that part of *Hayes-land* which lies in *A.* becauſe no more was deviſed to the ſon. *Cro. Eliz.* 674. But *per Popham*, if the deviſe had been to the eldeſt ſon, and if he dies without iſſue, *&c.* perhaps ſhe ſhould have had all, becauſe the eldeſt ſon had all, part by deviſe and part by deſcent.

7. If a man ſeiſed in fee of two houſes in *D.* adjoining the one to the other, and the one is in the poſſeſſion of *A.* and the other in the poſſeſſion of *B.* which is alſo the corner-houſe in the ſtreet of the town, and he deviſes his corner-houſe in the poſſeſſion of *A.* and *B.* by theſe words, only the houſe, which is in the poſſeſſion of *B.* ſhall paſs, which is the corner-houſe, and not the other houſe which is in the poſſeſſion of *A.* though

hough it be next adjoining thereto, for his intent appears to be . 1 *Rol. Abr.* 613, 614. *Cro. Car.* 447. *Vide Stile* 261.

8. *A.* ſold lands to *B.* but before a conveyance was executed, . ſold the ſame lands to *C.* and then *A.* conveyed to *C.* and *C.* eing thus ſeiſed, deviſed the land to his younger ſon in theſe ords, *I bequeath to* R. *my ſon all my land which I purchaſed of* whereas in ſtrictneſs of law he purchaſed them from *A.* who onveyed them to him; yet this was allowed to be a ſufficient eſcription of the land, and conſequently a good deviſe of it, ecauſe the purchaſe was really made from *B.* the money being aid to him. *Thorp* and *Thompſon*, 2 *Leon.* 120.

9. If one deviſes his houſe wherein *J. S.* dwells, called the *hite Swan* in *Old-ſtreet*, to *J. N. &c.* and dies, and at the me of his death and making of the will, *J. S.* occupied the ntry only, and three of the upper rooms of the houſe, and thers occupied the garden and other parts of the houſe; yet ll the houſe paſſes, for the houſe imports the whole houſe, nd the ſign of the *White Swan* makes it ſtill more certain. *Cro. ar.* 129. 1 *Jon.* 195. S. C.

10. If a man is ſeiſed of a meſſuage and two acres of land *A.* and two of acres of meadow in *B.* and hath uſed and occuied the two acres of meadow, being four miles diſtant from is ſaid houſe, together with his ſaid houſe and lands in *A.* nd deviſes the houſe *cum omnibus & ſingulis pertinentiis ſuis dinde ſpectant'* to *J. S.* the two acres of meadow ſhall not paſs; or by the words *cum pertinentiis* lands paſs not, but ſuch things nly as may be properly appertaining; otherwiſe if the words ad been *cum terris pertinentibus*, for then the lands uſed therewith ſhould have paſſed. *Cro. Car.* 57.

11. If *A.* deviſes ſeveral pecuniary legacies, and alſo ſome nds, and then deviſes all the reſt and reſidue of his money, oods and chattels, and other eſtate whatſoever, to *J. S.* whom makes executor, he having other lands, they ſhall paſs by he will. *Trin.* 27. *Car.* 2. *Tirrel* and *Page*, 1 *Chan. Ca.* 262.

12. But if a man ſeiſed in fee of three tenements, and poſſeſſed of divers goods, and of a leaſe for years, deviſes one tenement to one of his ſons, and another tenement to one of his daughters, and then adds: *Item, I make my two ſons executors of all my goods moveable and immoveable, and all my lands, debts, duties and demands*; by this clauſe no eſtate in the three tenements, of which the deviſor was ſeiſed in fee, paſſed to the executors by force of the words, *and all my lands*, becauſe that theſe words might well be ſatisfied by the leaſe for years of land, which paſſed by it. 1 *Rol. Abr.* 613.

13. *A.* deviſed in the following manner: *I make my niece executrix of all my goods, lands and chattels*; the teſtator had a real and perſonal eſtate, but no leaſes or intereſts for years in any lands whatſoever; and the queſtion was, whether any, or what eſtate paſſed in the lands by this deviſe; and my lord Chancellor was clear of opinion, that the real eſtate did not paſs by thoſe words; and that the word *lands* was not (as objected) uſeleſs, and to be rejected, for that in all probability there might be rents in arrear of thoſe lands which would paſs to the niece by her being made executrix. *Paſc.* 1717. *Piggot* and *Penrice*. *Vide Prec. in Chan.* 471. and *Gilb. Eq. Rep.* 137. S. C. *in totidem Verbis* with *Prec. in Chan.* 2 *Atk.* 450. 1 *Wils* 333. *Cowp.* 299. 7 *Br.* Parl. *Ca.* 467.

14. If *A.* deviſes certain lands to his youngeſt ſon in fee, and deviſes all his lands in *D.* to his wife for life: *Item*, I give to her for life the lands which I hold of *G. T. Item*, I give to her all the lands which I purchaſed of *J. S. Item*, I give my lands to my ſon *E.* and his heirs for ever; not only the lands purchaſed of *J. S.* but alſo the reverſion of all the others do paſs by theſe words; adjudged 35 *Car.* 2. *Barrow* and *Gameam*, *Skin.* 130.

15. If *A.* being ſeiſed of the manor of *A.* and of other lands in the county of *S.* deviſes the manor of *A.* for ſix years, and part of the other lands to *J. S.* in fee, and then comes this clauſe and the reſt of my lands in the county of *S.* or elſewhere, I give to my brother, *&c.* by this deviſe he ſhall have the reverſion of the manor. *Allen* 28.

Carth. 50. S. C. *Cro. Eliz.* 159. 3 *P. Wms.* 56. 3 *Atk.* 486. 1 *Vez.* 11. 1 *Brown's* Par. Caſ. 108.

16. If *A.* ſeiſed in fee deviſes ſeveral houſes to a charitable uſe, and deviſes a meſſuage to *J. S.* for life, and by another clauſe deviſes to his wife, the better to enable her to pay his legacies, all his meſſuages, lands, tenements and hereditaments *not above diſpoſed of*; this will paſs the reverſion of the ſaid meſſuage, though it was found that the wife had ſufficient to pay the legacies. *Mich.* 1 *W. & M. Willows* and *Lydcot*, 2 *Vent.* 28[illegible] Adjudged upon a writ of error in the exchequer chamber, and the judgment given in *B. R.* reverſed. 1 *Lev.* 212. S. P. adjudged; *vide* the caſe of *Hyley* and *Hyley*, 3 *Mod.* 228. which ſeems *cont'*, but has been denied to be law in ſeveral of the following caſes.

Prec. in Cham. 202. S. C. and decreed. 1 *Freem.* 519. S. C. and the opinion of the judges of C. B. certified accordingly.

17. *J. S.* ſeiſed in fee deviſed *Black-acre* to *A.* for life; and deviſed to *B.* all his lands not before deviſed to be ſold, and the money to be divided between his younger children; the queſtion was, whether the reverſion of *Black-acre* paſt by the deviſe of all his lands not before deviſed; and it having been referred to the judges of the common pleas, they unanimouſly agreed, and certified that the reverſion was well deviſed; and it was decreed accordingly. *Hill.* 1703. *Rooke* and *Rooke*, 2 *Vern.* 461.

18. *A.* by virtue of ſeveral ſettlements, being tenant in tail after poſſibility of iſſue extinct, of ſome lands, remainder in fee to truſtees, in truſt for him and his heirs; and as to ſome other lands being tenant for life, remainder to his firſt and other ſons, remainder to truſtees in fee, in truſt for the right heirs of [illegible] whoſe heir *A.* was; and as to other lands, being tenant in tail, remainder to the right heirs of his father, whoſe heir he likewiſe was; and being likewiſe ſeiſed of a very conſiderable real eſtate of his own purchaſe, and poſſeſſed of a large perſonal eſtate, made his will, and deviſed ſome part of his lands to his wife for life, and gave ſeveral legacies; and having no iſſue deviſed all other his lands, tenements and hereditaments, *out of ſettlement*, to his nephew, provided he took on him his ſurname ſubject to raiſe 4000*l.* in caſe the teſtator left a daughter; and it was held by my lord *Chancellor*, aſſiſted with the *maſter of the rolls*, *Trevor* Ch. Juſt. and Juſt. *Tracy*, that all the eſtate thus ſettled paſſed by the will, notwithſtanding the words *out of ſettlement*; for the word *hereditament* comprehends a remainder or reverſion, as well as an eſtate in poſſeſſion. Decreed *Mich.* 1708. Sir *Litton Strode* and Lady *Ruſſel*, 2 *Vern.* 621.

3 *Will. Rep.* 56 S. C. ſays, it was decreed by the unanimous opinion of *King* C. *Raymond* Ch. Juſt. *Reynolds* Ch. B. and *Price* J.—*Gibb.* 152. S. C. and P.

19. So where *A.* being ſeiſed in fee of lands in *D.* upon the marriage of his eldeſt ſon, ſettled thoſe lands on him in tail male, remainder to his own right heirs; and being ſeiſed in fee

in poſſeſſion of other lands in *M. L.* and *N.* deviſed all his meſſuages, lands, tenements and hereditaments in *M. L. N.* or *elſewhere*, not by him formerly *ſettled*, for the payment of his debts; and after debts paid, then to *J. S.* a ſecond ſon, and his heirs for ever, and died; and ſoon after the eldeſt ſon died, not having barred the remainder, without iſſue male, but left ſeveral daughters; and it was held by my lord *Chancellor*, aſſiſted with *Raymond* Ch Juſt. *Reynolds* C. B. and Mr. J. *Price*, 1*ſt*, that the word *elſewhere* was a ſufficient deſcription of the lands in *D.* though of greater value than thoſe in *M. L.* and *N.* and that though it was of it ſelf a ſignificant and expreſſive term; yet it was the rather ſo in this caſe, becauſe there were no lands or out-ſkirts not particularly enumerated, to which it could be applied but to thoſe in *D.* 2*dly*, that the words *meſſuages, lands, tenements and hereditaments*, were ſufficient to paſs the reverſion of the lands in *D.* notwithſtanding the exception or reſtrictive words, *not formerly ſettled.* Decreed *Trin.* 1730. *Cheſter* and *Cheſter.*

20. But if *A.* deviſes lands to *B.* in *D. S.* and *T.* and all his lands *elſewhere*, and he hath a mortgage of lands that did not lie in *D. S.* or *T.* which is of more value than the lands in *D. S.* and *T.* the mortgaged lands will not paſs; for he could not be thought to mean to comprehend lands of ſo much value under the word *elſewhere*, which is like an *&c.* that comes in *curente calamo*, 33 *Car.* 2. Sir *Thomas Littleton*'s caſe, 2 *Vent.* 351. Decreed; but the reporter ſays there were other circumſtances in the caſe, which ſhewed that it was not his intention that the mortgaged lands ſhould paſs. *Vide* 1 *Vern.* 3. S. C. where it appears that there were ſome ſmall parcels of land not ſpecified and of the ſame nature as thoſe deviſed; to which the court held the word *elſewhere* was applicable, and not to the mortgaged lands, (*a*) which were of a different nature (*a*) and of greater value; and that the teſtator had charged the lands deviſed with a rent charge of 80*l. per ann.* which he never could intend ſhould iſſue out of lands which were every day redeemable.

(*a*) This ſeems the chief reaſon, and there being other lands to ſatisfy the "elſewhere"—as to its being of greater value that is really no objection, as appears by *Caſ.* 19.

21. By a general deviſe of all lands, tenements and hereditaments, mortgages in fee, tho' forfeited, will not paſs, nor will they paſs by ſuch a general deviſe, tho' the equity of redemption is, after the making the will, foreclоſed or releaſed. 2 *Vern.* 623. *per curiam.*

Vid autem. 2 *Vent.* 351. a preliminary point laid down by Ld. Chan. which ſeems cont.

22. A man having ſettled all his eſtate of inheritance upon his wife for life, for her jointure, makes his will, and thereby deviſes ſeveral pecuniary legacies to ſeveral perſons, and then ſays, *All the reſt and reſidue of my eſtate, chattels real and perſonal*, I give and deviſe to my wife, whom I made ſole executrix; and the only queſtion was, whether by this deviſe the reverſion of the jointure lands paſſed to the wife; and my lord keeper, having taken time to conſider of it, delivered his opinion, that it did not, becauſe the precedent and ſubſequent words explain his intent, to carry only his perſonal eſtate; for in the firſt part of his will, having given only legacies, and no land whatſoever, the words all the reſt and reſidue of his eſtate are relative, and muſt be intended eſtate of the ſame nature with that he had before deviſed, which was only perſonal; for having before given no real eſtate, there could be no reſt or reſidue of that our

Gilb. Eq. Rep. 30. *Hil.* 9 *Ann.* S. C. accordingly ſays, lord keeper ſaid that this caſe differed from the caſe of *Murray* and *Wiſe*, (2 *Vern.* 564.) and that no reſolution was ever carried ſo far as to conſtrue theſe words to paſs a fee.

of which he had given away none; then the words, *chattels real and perſonal*, explain the word *eſtate*, and ſhew what ſort of eſtate he meant; and make the deviſe, as if he had ſaid, all the reſt of my eſtate, whether chattels real or perſonal, *&c.* and ſo confine and reſtrain the extended ſenſe of the word *eſtate*. Decreed *Hill.* 1712. *Markant* and *Twiſden.*

3dly, *By Uncertainty in the Deſcription of the Perſon to take.*

1. If *A.* deviſes lands to the eldeſt ſon of *J. S.* by the name of *William*, when in truth his name was *Andrew*, yet the deviſe ſhall be (*a*) good. *Nel. Chan. Rep.* 403.

(*a*) A deviſe to the eldeſt ſon of *J. S.* is good, or to his ſecond or youngeſt; ſo is a deviſe to the wife of *J. S.* or though ſhe be called *Em.* for *Emlyn*, and to *Robert* Earl of, *&c.* though his name was *Henry*. *Co. Lit.* 3. A deviſe to the ſtock, family, or houſe, is good; and ſhall be intended of the heir. *Hob.* 33.

2. If a man has two ſons named *I.* and deviſes to his ſon *I.* all his lands; this is a void deviſe for the uncertainty, unleſs it can be proved that the teſtator meant one of them in particular, by the elder ſon's being beyond ſea, probably dead, *&c.* for theſe circumſtances clear up the intent of the teſtator; and ſuch averment is admitted, becauſe it is conſiſtent with the will; and the conſtruction and judgment thereon muſt be genuine, becauſe taken from the words of the will. 5 *Co.* 68. *b.*

Vid. alſo cont' to this caſe. *Gilb. Eq. Rep.* 28. 2 *Equ. Abr.* 359. pl. 10.

3. If a man hath iſſue two ſons and two daughters, and deviſes his land to his wife for life, and that after her death the ſame ſhall remain to his iſſue; this is a void deviſe as to the remainder; for having ſeveral children, it is uncertain what iſſue is intended. (*b*) *Taylor* and *Sayer*, *Cro. Eliz.* 742.

(*b*) *Vide Raym.* 83. S. C. cited, and denied to be law, and 3 *Lev.* 433. *cont'*, and 6 *Co.* 17.

4. If a man has iſſue eight daughters by three ſeveral venters, and one ſon, and deviſes his land to his youngeſt daughter, the remainder to his ſon in tail, the remainder to his two daughters by the middle venter for life, the remainder *proximo de ſanguine* of the deviſor, and dies; and after the eldeſt daughter has iſſue, and dies; and after the ſon, and all the other daughters, except the two daughters by the middle venter, to whom it was given for life, die without iſſue, the iſſue of the eldeſt daughter ſhall have it. *Palm.* 303. *Vide Stile* 240.

5. If a man deviſes all his lands to one of his couſin *Nic. Amherſt*'s daughters, that ſhall marry a *Norton* within fifteen years, and dies; and *Nic. Amherſt* having three daughters, one of them marries a *Norton* within the fifteen years; this is a good deviſe to her, notwithſtanding the uncertainty; and the law ſupplies the words, who ſhall firſt marry, *&c.* *Mich.* 15 *Car.* 2. *Bate* and *Amherſt*, *Raym.* 82. adjudged.

6. If a man deviſes lands to *J. S.* in truſt for *A.* and the heirs of his body, remainder to *B.* for life; and further wills, that if *A.* die without iſſue, and *B.* be then deceaſed, then, and not otherwiſe he gives the lands to *J. N.* and his heirs; though *A.* dies without iſſue, and *B.* ſurvives; yet after the death of *B.* *J. N.* ſhall take; for the words, if *B.* then deceaſed, expreſs the teſtator's meaning, that *B.* ſhould be ſure to have it for life; and alſo ſhew when *J. N.* ſhould have it in poſſeſſion. 2 *Vent.* 363.

7. *A.*

7. *A.* deviſes land to truſtees in fee, in truſt to pay debts and legacies; and after thoſe debts paid (*a*) then to ſell; and if any of the teſtator's name would buy it, ſuch perſon to have it for 200*l.* leſs than the value; one of the teſtator's name brings a bill for this benefit of pre-emption, but delays bringing of it till twenty-five years after the teſtator's death; and the bill was diſmiſſed *per* Lord Chancellor; for if two of the teſtator's name ſhould claim the benefit of the deviſe, who muſt have it? *Hil.* 1685. *Huckſtep* and *Mathews*, 1 *Vern.* 362.

(*a*) This does not appear, that the lands muſt neceſſarily be ſold in the report, but that the lands ſhould remain to the truſtees and their heirs, unleſs ſome perſon of

the name ſhould purchaſe, and that then he, &c. Qu. if this was the Ld. Chanc. reaſon, it ſeems only an interrogatory note of Mr. *Vernon?*

8. *A.* deviſed lands to truſtees in truſt for his daughter for life, remainder to the ſecond ſon of her body to be begotten in tail male, and ſo to every younger ſon; and in default of ſuch iſſue male, to her eldeſt daughter, and to the firſt ſon of her body; taking upon him the name and arms of the teſtator; and adds further, that he did not by will deviſe the eſtate to the eldeſt ſon, becauſe that he expected that his daughter would marry ſo prudently, as that the eldeſt ſon would be provided for; the daughter married, and had iſſue a ſon, who died in twelve months after his birth; ſhe afterwards had another ſon born, after the death of the firſt; this ſecond muſt take, according to the words of the will, though contrary to the intention of the teſtator. *Trin.* 1710. *Trafford* and *Aſhton*, 2 *Vern.* 660.

Vid. 3 *Will. Rep.* 179. 1 *Vez.* 290.—3 *Burr.* 1570.

9. If *A. B.* and *C.* being aliens and brothers, *A.* has iſſue a ſon, and *B.* and *C.* are naturalized, and *B.* purchaſes lands, and deviſes them to the heir of his brother *A.* and his heirs; and *B.* dies, living *A.* and his ſon, the deviſe is void for the uncertainty who is intended thereby; for *A.* being an alien can have no heir; or however, being living, can have none during his life; but *per Glyn*, Ch. Juſt. if it had been found that the ſon of *A.* was the reputed heir of *A.* though *A.* was an alien, yet his ſon might have taken by this deviſe. *Trin.* 1656. *Foſter* and *Ramſey*, 2 *Sid.* 23. 51.

10. A man had iſſue a ſon and a daughter, the daughter was married, and had iſſue two daughters; the father deviſed, that all his land ſhould deſcend to his ſon; provided that if his ſon died without iſſue of his body, then my land to go to my right heirs male of my name and poſterity for ever; the ſon died without iſſue; and upon ejectment between the brother of the deviſor and the daughters, this was held a void deviſe, becauſe neither could claim under the deſcription of the will; not the brother, becauſe, though he was of his name, yet he was not his (*a*) heir; and though the daughters were his heirs, yet they were not of his name, and ſo not within the words of

(*a*) This reſolution is founded on a rule laid down in the old books, *viz.* that he who taketh by deſcription or purchaſe, as heir, muſt be heir general or compleat heir; for inſtance, if lands are deviſed to the heirs of *J. S.* and *J. S.* is living at the death of the teſtator, the deviſe is void, for *non eſt hæres viventis*; ſo if lands are deviſed to the right heirs male of *J. S.* and the heir of *J. S.* is a female, the deviſe is void; or if the deviſe were to the heirs female, and the right heir had been a male, it would be void in the ſame manner; to which purpoſe, *vide Moor* 860. *Co. Lit.* 24. *b.* 2 *Leon.* 70. *Dyer* 99. *Hob.* 33. 1 *Co. Archer's* caſe. 1 *Co.* 103. *Shelley's* caſe. But notwithſtanding theſe authorities, this doctrine has been ſhaken by the following more modern reſolutions in which it is held, that a ſpecial heir may take by purchaſe, and that a deſcription of a perſon by the name of heir, though not heir general, operating with the intention of the teſtator, is ſufficient to aſcertain the perſon to take. *Vid. autem.* 2 *Will. Rep.* 1, 2.—*Dawes* and *Ferrers.*

the

the will; and conſequently the limitation void for the uncertainty. *Counden* and *Clerk*, *Hob.* 29, 30.

11. If a man deviſes lands to *A.* and his heirs, during the life of *B.* in truſt for *B.* and after the deceaſe of *B.* to the heirs males of the body of *B.* now living, *B.* having one ſon then living; by this deviſe a remainder is immediately veſted in the ſon; for the words *heirs males now living*, in a will, are a full deſcription of the ſon, who then was the heir apparent of *B.* and known by the deviſor (who was his uncle and godfather) to be ſo. *Mich.* 29 *Car.* 2. *James* and *Richardſon*, 2 *Jones* 99. adjudged in *B. R.* but (*b*) reverſed in the exchequer chamber.

(*b*) *Note*; The judgment of reverſal was reverſed in the houſe of lords. 2 *Lev.* 232. S. C. and *per Levinz*, this point was tried again upon a new ejectment, and like judgment given as at firſt in *B. R.* which was confirmed in the exchequer chamber, and likewiſe in the houſe of lords. 1 *Vent.* 334. S. C. by the name of *Burchett* and *Durdant*. 2 *Vent.* 311. S. C. *Raym.* 330. S. C. 3 *Keb.* 32. S. C. *Poll.* 457. S. C.

12. *A.* deviſed in this manner: *I give to my eldeſt heir male, and his heirs males for ever, all my lands in ſuch a place; and if there be a female, ſhe to have* 12*l.* per ann. *as long as ſhe lives*; the teſtator had two ſons, the eldeſt of which died in his life-time, leaving iſſue a daughter; and it was adjudged that the lands ſhould go to the ſecond ſon, and not to the daughter of the eldeſt, though ſhe was heir general. *Trin.* 3 *W.* 3. *Rot.* 1484. *Baker* and *Hall* in *C. B.*

1 *Will. Rep.* 229. S. C.

13. *A.* deviſes all his lands to *B.* and *C.* and the ſurvivor of them, for the term of twenty-one years, for the payment of his debts and legacies, and after payment the term to ceaſe; and after the end or ſooner determination of that eſtate, he deviſes the premiſſes to the firſt ſon of his body, and to the heirs males of the body of ſuch ſon lawfully iſſuing; and for default of ſuch iſſue, to *B.* for ninety-nine years, if he ſo long live, without impeachment of waſte, remainder to the firſt and other ſons of *B.* and the heirs male of their bodies ſucceſſively; remainder to *C.* for ninety-nine years, if he ſo long live, remainder to his firſt and other ſons in tail male ſucceſſively; remainder to the heirs males of my *aunt* Mrs. *Eliz. Long*, wife of *Richard Long*, clerk, lawfully begotten, with remainder to his own right heirs; and by his will gave 150*l.* annuity to *Dorothy Beaumont* his ſiſter, the plaintiff in error, for life, and 500*l.* to her children; and to his aunt *Eliz. Long* 100*l.* and to her children 500*l.* and dies without iſſue; *B.* and *C.* entered by virtue of the deviſe for twenty-one years; and afterwards both died without iſſue, and *John Beaumont* and *Dorothy* his wife, entered in right of *Dorothy*, as heir at law to the teſtator; the term for twenty-one years being determined, and the debts and legacies paid, and *Thomas Long*, eldeſt ſon of *Eliz.* (ſhe having, at the time of making the ſaid will, three ſons, *viz.* the ſaid *Thomas*, and two others) entered and brought ejectment; and in the exchequer judgment was given by the lord chief baron *Ward*, *Price* and *Lovell*, againſt baron *Bury*, for the plaintiff *Thomas Long*; but in *Trinity* term 1713, this judgment was reverſed in the exchequer chamber; and upon error brought in the houſe of lords it was argued, that this reverſal ſhould be affirmed, 1*ſt*, becauſe *Dorothy* being heir at law to the teſtator, her

her right, as ſuch, was to be favoured; and all deviſes to dis- *Plowd. Com.* 345. *Prec. Cha.* 69.
inherit an heir at law were to be taken ſtrictly. 2*dly*, that to make this deviſe good to *Thomas Long*, it muſt be conſtrued either a contingent remainder, or the words heirs *males* be taken as a *deſcriptio perſonæ*, to veſt in him: as a contingent remainder, it cannot be good for want of a freehold to ſupport it, all the preceding eſtates being only for years; beſides, if it were good as a contingent remainder in its creation, yet *Eliz. Long* the mother being alive when the particular eſtate determined, it cannot veſt, becauſe *non eſt hæres viventis*; as a *deſcriptio perſonæ* it cannot veſt, for that ought to be ſuch a deſcription as is *vice nominis*, which the words *heirs males* (being a legal term, and not accompanied with any other words to determine the ſenſe otherwiſe, as heir apparent, or heir now living, &c.) cannot amount to; and the word *begotten* doth not determine the ſenſe otherwiſe; nor does any intent appear to confine the deviſe to the iſſue male of *Eliz. Long*, much leſs to *Thomas Long* only, as the perſon deſcribed in this deviſe; but notwithſtanding theſe reaſons, it was adjudged, that the judgment ſhould ſtand, and the judgment of reverſal be reverſed; though ten of the judges were of opinion, that the deviſe was void, and only the three judges (*Lovell* being dead) before-mentioned, held it good. *Mich.* 1713. *in domo procerum*, *Beaumont* and *Long*.

14. *J. S.* deviſed to truſtees in truſt, after debts and legacies paid, to convey to *A.* his couſin, and the heirs males of his body; and for want of ſuch heirs males, then to the heirs male of the body of *B.* his great grandfather, and for want of ſuch heirs male, to his own right heirs for ever; and gave to his ſiſter 2000*l.* to be put out at intereſt during her life, ſhe to receive the intereſt and after her death to her children, and died; and ſoon after *A.* died without iſſue; and *C.* being heir male of *B.* the teſtator's grandfather, but not heir general, there being a daughter of an elder brother; the queſtion was between him and the teſtators ſiſter and heir at law, who had the 2000*l.* deviſed to her, whether the deviſe was void, or not; and lord chancellor held the deviſe good, and that *C.* ſhould take as a perſon ſufficiently deſcribed and intended by the teſtator. Decreed *Mich.* 1716. *Newcomen* and *Barkham*, 2 *Vern.* 729. and this matter well debated.

Prec. in Chan. 442, 461. *Browne* and *Barkham* S. C. and Decree. 2 *Will. Rep.* 2. is a note, that in *Mich.* 1739, a bill of review was pending to reverſe this decree. See the caſe of *Dawes* and *Ferras*, *Eq. Ca. Abr.* part 2. 331. Cas. 6. *Fearne Cont. Rem.* 109 146. 1 *Str.* 35. S. C. 1 *P. Wms.* 652. S. C. & *N.* 2 *P. Wms.* 1. 5 *Burr.* 2615. 2 *Black. Rep.* 687. *Cowp.* 657. *Doug.* 730. 3 *Wills.* 418.

4*thly*, *By the Deviſee of Lands dying in the Life-time of the Deviſor.*

1. If a man deviſes lands to *A.* and his heirs, and *A.* dies in the life-time of the deviſor, *B.* the heir of *A.* ſhall take nothing by the will, for the heirs of *A.* were not named as immediate takers, but only to expreſs the quantity of the eſtate that *A.* ſhould take. *Trin.* 10 *Eliz. Bret* and *Rigden*, *Plow. Com.* 345. adjudged *per totam curiam*, *præter Walſh*, tho' after the death of *A.* the deviſor ſaid to *B.* that he ſhould be his heir, and ſhould have all the lands which *A.* ſhould have had, if he had outlived the deviſor. *Vide* 2 *Lev.* 243. *And what amounts to a new publication*, title *Will*. 1 *P. Wms.* 397. *Fearne Cont. Rem.* 124.

2. So if a man deviſes lands to *A.* his ſecond ſon, and to the heirs of his body; and after his death without iſſue, then to *B.* his third ſon in tail, &c. if *A.* hath iſſue, and dies in the life of the

the deviſor, and then the deviſor dies, *B.* ſhall have the lands preſently; for the deviſe to *A.* being void, it is as if it had never been made. *Hil.* 36 *Eliz. Fuller* and *Fuller*, *Cro. Eliz.* 422, 423. *But if the deviſe had been to the deviſor's eldeſt ſon in tail, remainder to the ſecond ſon, and the eldeſt ſon had died in the life-time of the deviſor, leaving iſſue,* Q.

3. If a man deviſes to *A.* and his heirs, to the uſe of *C.* and his heirs, and *C.* dies in the life-time of the deviſor, his heir can take nothing; but the deviſe will be to the uſe of the deviſor and his heirs. *Hortop*'s caſe, 1 *Leon.* 253. *Cro. Eliz.* 243.

4. But if there be a deviſe to *A.* for life, remainder to *B.* in fee; tho' *A.* dies in the life of the deviſor, *B.* ſhall take, or if *A.* refuſes he ſhall take. *Plowd.* 344. *Cro. Eliz.* 423. 1 *Co.* 101. *a.*

5. If a man deviſes his lands to his wife for life, and after to his four daughters and heirs, equally to be divided between them, ſhare and ſhare alike, to hold to them and their heirs for ever; and one of the daughters dies, having iſſue a ſon, and then the deviſor dies; the will is void for a fourth part. *Hil.* 1656. *Pachman* and *Cole*, 2 *Sid.* 53, 78. adjudged.

Prec. in Chan. 439, 452. *Simpſon* and *Hornſby* S. C. and P.—*Gilb. Eq. Rep.* 115, 120. S. C. and P.

6. So if *A.* has iſſue two daughters, *B.* and *C.* and he deviſes ſome tithes and money to *B.* and gives legacies to her children, but declares, that ſhe having married without his conſent, ſhe ſhould have no part of his real eſtate, and deviſes his real eſtate to *C.* in tail, remainder to *B.* for life, and to her firſt, &c. and *C.* marries and dies in the life-time of the teſtator, leaving iſſue; though afterwards *A.* makes a codicil to his will, and deviſes ſome particular legacies out of his perſonal eſtate; yet as that does not amount to a republication of his will, *B.* muſt have the lands immediately after the death of the deviſor, though contrary to the intention of the deviſor; the authorities being ſo. *Per* lord Chancellor, *Mich.* 1716. *Hutton* and *Simpſon*, 2 *Vern.* 722.

7. If a man deviſes lands to *A.* and *B.* and their heirs; and *A* dies in the life of the deviſor, *B.* ſhall take the whole land. *Mich.* 16 *Car.* 2. *Davis* and *Kemp*, *Carter* 4, 5.

CAP.

CAP. XXVII.

Dower and Jointure.

(A) *Of what Eſtate of the Huſband's, with Reſpect to the Nature and Quality thereof, ſhall a Woman be endowed.*

(B) *What ſhall be a Satisfaction or good Bar of Dower, and how far a Dowreſs ſhall be favoured in Equity.*

(C) *Of Jointures, and in what Caſes a Jointreſs ſhall be more favoured or reſtrained in Equity than at Law.*

(A) *Of what Eſtate of the Huſband's, with Reſpect to the Nature and Quality thereof, ſhall a Woman be endowed.*

1. IF *A.* in conſideration of 100*l.* by bargain and ſale inrolled, conveys to *B.* and his heirs, to the intent that *B.* ſhall re-emiſe to *A.* for life, with a condition, that if *A.* paid the 100*l.* at the end of twenty years, the bargain and ſale ſhould be void; and *B.* redemiſes accordingly, and dies, his wife ſhall be endowed; for though *B.* redemiſed upon the former agreement, yet *A.* takes it ſubject to the title of dower; and it was his folly that he did not join another with the bargainee, as is the ancient courſe in mortgages. *Paſch.* 6 *Car.* 1. *Naſh* and *Preſton*, *Pro. Car.* 190. agreed *in cancellaria*, by *Jones* and *Croke*; and upon a conference with the other juſtices certified accordingly. *Vern. P. C.* 72. S. C. cited. *Vid. Cont'* to this caſe 2 *Freem. Rep.* 43. 2 *Eq. Abr.* 383. pl. 1. *Noel* and *Johnſon*, 1678.

2. If a huſband, before marriage, conveys his eſtate to truſtees and their heirs, inſuch manner as to put the legal eſtate out of him, though the truſt be limited to him and his heirs; yet the wife ſhall not be endowed of this (*a*) truſt-eſtate. *Paſch.* 12. *Bottomley* and lord *Fairfax*, agreed clearly, and admitted *per curiam*, 1 *Chan. Rep.* 254. S. P. *Prec. in Chan.* 336, S. C. and P. *Vide Attorney General* and *Scot*, *Eq. Ca. Abr.* part 2.

(*a*) Of a uſe *(not executed)*

woman ſhall not be endowed, neither ſhall the huſband be tenant by the *curteſy*, *vide Perk.* 1 *Co.* 123. 4 *Co. Vernon's* caſe. *Doctor* and *Stud. lib.* 2. *cap.* 22. *Dyer* 11. *pl.* 47. But to the huſband's being tenant by the *Curteſy*, *vide* 2 *Vern.* 585, 681. and Q. if there be any difference.—There ſhall be a tenancy by the curteſy of a truſt, as well as of a legal eſtate, by the caſe of *Watts* and *Ball*, *Eq. Ca. Abr.* part 2. and 2 *Equ. Abr.* 728, 9.

3. But

3. But if a father purchaſes lands in his eldeſt ſon's name, and the ſon is put into poſſeſſion, who afterwards falls ſick, and in his ſickneſs the father gets him to execute a deed, declaring his name was made uſe of only in truſt for him; and the ſon recovers and continues in poſſeſſion, and marries; after his death, his wife ſhall be endowed notwithſtanding this declaration of the truſt; and tho' the father had got a conveyance of the legal eſtate from the younger ſon; for *per* lord chancellor, this is a ſecret and fraudulent deed of truſt, to deceive creditors and purchaſers, and therefore reverſed the maſter of the roll's decree, who had decreed it for the father, *Paſch.* 1702. *Bateman* and *Bateman*, 2 *Vern.* 436.

4. If a man deviſes lands to his executors for payment of debts and after debts paid to his ſon in tail; and the ſon marries, and dies before debts paid, the eſtate of the executors is only a chattel intereſt, and will not hinder the ſon's wife of dower; but the wife's dower cannot commence in poſſeſſion, nor damages be recovered for detaining it, but from the time of the debts being paid. 2 *Vern.* 404. *per curiam.*

5. If the lands of *J. S.* are ſequeſtred for a perſonal duty, and he marries and dies, though the lands were ſequeſtred before marriage, yet the wife's right of dower will attach them; for this ſequeſtration ſhall not ſo far bind or cover them, as to hinder the wife of her dower. 1 *Vern.* 118. ruled on demurrer *per* lord keeper *North.*

(B) *What ſhall be a Satisfaction, or good Bar of Dower, and how far a Dowreſs ſhall be favoured in Equity.*

1. IF a man deviſes certain lands, money, goods, &c. in lieu and ſatisfaction of dower, the wife cannot have both; but ſhe may waive the deviſe and (*a*) claim her dower. 2 *Chan. Ca.* 24. 1 *Chanc. Ca.* 181. 1 *Vent.* 340. S. P.

(*a*) But if a man deviſes lands to his wife during widowhood, without expreſſing any conſideration, the wife ſhall have both. 1ſt, Becauſe a will imports a conſideration in itſelf, and cannot be averred to be in bar of dower without it be ſo expreſſed. 2*dly*, Dower cannot be of leſs eſtate than for life of the wife. 3*dly*, A right to dower cannot be barred by collateral recompence. 4 *Co.* 1, 2. *Vernon*'s caſe. *Ca. Li.* 36. *Moor, pl.* 103. But if ſhe makes her election to take under the will, ſhe cannot afterwards claim her dower. *Cro. Eliz.* 128. 3 *Leon.* 272. 3 *Co.* 27. *Dyer* 220.

2 *Freem. Rep.* 234. S. C. and P. ſays, the decree was reverſed by lord keeper—S. C. cited by the maſter of the rolls, *Trin.* 1731. 2 *Will. Rep.* (617.)

2. *J. S.* deviſed legacies to his wife out of his perſonal eſtate and deviſed to her part of his real eſtate, during her widowhood and deviſed the reſidue of his eſtate to truſtees for twenty-one years, for payment of debts and legacies; and the remainder of the whole eſtate he deviſed to the plaintiff, (who was his godſon, and of his name, but a remote relation) for life, and to his firſt and other ſons in tail; and lord chancellor *Somers* decreed, that though it was not declared in the will to be in lieu and ſatisfaction of dower; yet as it may be plainly collected to be ſo intended (he having made diſpoſition of his whole eſtate) and as a collateral ſatisfaction may be a good bar to dower in equity, though not at law; that ſhe muſt either take her dower and waive the deviſe, or accept the deviſe and waive the dower. *Mich.* 1699. *Lawrence* and *Lawrence*, 2 *Vern.* 36[illegible]

But this decree was reverſed by *Wright* lord keeper, *Mich.* 1702. which decree of reverſal was affirmed in the houſe of lords, with 30*l.* coſts, 17 *May* 1717. 1 *Vern* 356 1 *P. Wms.* 138. 2 *P. Wms.* 700. 2 *Atk.* 526. *Brown's Rep.* 326, 327.

3. The lady *Radnor*'s huſband was ſeiſed in tail of the lands in queſtion; but there was a term for ninety-nine years, prior to his eſtate (which was created for performance of ſeveral truſts in the earl of *Warwick*'s will, which were all performed, and after to atttend the inheritance); he levied a fine and ſuffered a recovery, and ſold the eſtate to *J. S.* who had notice of the marriage; but his wife not joining, ſhe, after his death, recovered dower, with a *ceſſat executio*, during the term, and brought her bill to have this term removed, and to have the benefit of her judgment, and recovery at law; but the court held, that this being againſt a purchaſer, equity ought not to give her any relief, and therefore diſmiſſed the bill. *The lady Radnor* and *Vandebendy*, 1 *Vern.* 356. 2 *Chan. Ca.* 172. S. C. which decree of diſmiſſion was affirmed in the houſe of lords. *Show. P. C.* 69. 70.

Prec. in Chan. 65, S. C.— Lady *Radnor* and *Rotherham* S. C. and decree, which was affirmed in *Dom' Prec'* 14 *April* 1697. *Ibid.* 66.

4. A term was raiſed in *Black-acre*, in truſt, to indemnify *A.* againſt incumbrances that might affect *White-acre*, which he had purchaſed of *B.* the defendant; and the widow of the ſon and heir of *B.* brought a writ of dower of *Black-acre* againſt the plaintiff, who was an infant, and his guardian had let her take judgment at law, without ſetting up the term, or taking any notice of it; and the infant brought his bill to be relieved againſt the judgment; and the court held, that this caſe was the ſame with lady *Radnor*'s; the term being created to indemnify a purchaſer, muſt continue ſo, and ſubject to that, muſt be in truſt for the heir; and there is no difference where the widow is plaintiff or defendant; for it is the want of equity excludes her from relief. *Hil.* 1700. *Wray* and *Williams*, 2 *Vern.* 378. S. C. *but no reſolution.* (*a*)

Prec. in Chan. 151. S. C. accordingly. (*a*) —1 *Wms. Rep.* 137. *Hil.* 1700. *Williams* and *Wray*, ſays, 28 *June* 1700— it was decreed that the truſtee produce the truſt-deed, &c. and at a trial at law to enable the infant to recover poſſeſſion, and that the widow ſhould account for the profits; that 21 *March* 1701, upon a rehearing, and time taken to conſider of it, *Wright* lord keeper affirmed his former decree; but that on a bill of review brought by the widow, *Harcourt* lord keeper, on ſolemn argument, reverſed lord *Wright*'s decree, and ordered that the widow having recovered dower at law, this truſt-term ſhould not ſtand in her way. *Hil.* 1710. *Ibid.* 139. The reporter by way of note ſays, it appeared there was firſt a demurrer put in to this bill of review, which being over-ruled a decree was made by conſent, giving a ſum for the arrears of dower, and delivering up the poſſeſſion to the widow. *Vide* the argument of Sir *Joſeph Jekyll*, maſter of the rolls, in the caſe of *Banks* and *Sutton*, 2 *Will.* *Rep.* 700, 707.

5. But where a widow brought her bill to be relieved againſt a term for years, aſſigned in truſt, to attend the inheritance, and which had been ſet up by the heir at law, only in bar of her title; and the maſter of the rolls decreed for the widow, and that the term ſhould not (*b*) ſtand in her way; though it was objected, that it was the ſame with the purchaſer, who had notice. *Mich.* 1705. *Dudley* and *Dudley*.— S. P. decreed *Paſch.* 1710. *Higford* and *Higford*. (*c*)

(*b*) That tenant by curteſy ſhall have the aid of equity in removing a truſt, *vide* 2 *Vern.* 534, 536, 585, 681. not in 1710. for

(*c*) Decreed by Lord *Harcourt*, *Eaſter* 1711, and Jekyll, maſter of the rolls. *Vide* 2 *Will. Rep.* 707.

6. A dowreſs may redeem a mortgage, paying her proportion of the mortgage-money; and as to the reſt, ſhe may hold over till ſhe is ſatisfied. Decreed *Hil.* 1700. *Palmer* and *Danby*.

7. If

3 *Bac. Abr.* 640. S. C.

7. If the wife joins in a mortgage, and levies a fine, with an intent to bar her dower, and in conſideration thereof the huſband agrees that ſhe ſhall have the equity of redemption in lieu of her dower; and he afterwards mortgages the ſame eſtate twice more; although this agreement be fraudulent againſt the ſubſequent mortgagees, ſo as to intitle the wife to the whole equity of redemption, yet ſhe ſhall have her dower if ſhe ſurvives her huſband, and ſhall not be put to her writ of dower; becauſe the eſtate may be ſo conveyed away by ſome of the mortgagees, that poſſibly ſhe may not know againſt whom to bring her writ of dower. *Hil.* 1684. *Dolin* and *Coltman*, 1 *Vern.* 294.

8. If *J. S.* apprehenſive of a charge of high treaſon, makes a conveyance of his lands to his ſon, and afterwards marries a ſecond wife, a court of equity will order that ſuch conveyance be not made uſe of to hinder ſuch ſecond wife of her dower. 3 *Chan. Rep.* 94.

9. If there be a fraudulent and partial aſſignment of dower by the ſheriff, equity will relieve againſt it. *Hil.* 1683. *Hoby* and *Hoby*, 1 *Vern.* 218, 219. 2 *Chan. Ca.* 160. S. C.

(C) *Of Jointures, and in what Caſes a Jointreſs ſhall be more favoured or reſtrained in Equity than at Law.*

* 1. A Man upon his marriage, made a ſettlement, whereby he was tenant for life, then to his wife in ſpecial tail, of lands of 400*l. per ann.* value with remainder to the right heirs of the huſband; the huſband and wife joined in barring this ſettlement, and a new ſettlement was made in this manner, *viz.* to *J. S.* and his heirs, in truſt as to lands of 150*l. per ann.* for the wife and the heirs of her body; and for want of ſuch iſſue, in truſt for the huſband and his heirs; the huſband died without iſſue; and the wife ſuffered a recovery, and deviſed the lands for the payment of her debts, and died without iſſue; on a bill brought by the heir of the huſband againſt the defendants creditors of the wife, the queſtion was, whether this was ſuch a jointure made on the wife, ſo as to make the recovery a forfeiture within the ſtatute 11 *H.* 7. For the defendants it was objected, that a court of equity ought not to give any aſſiſtance, becauſe the ſtatute makes the recovery a forfeiture of her eſtate, and gives a remedy by way of entry; and in this caſe ſhe has only a truſt, and no eſtate to forfeit; it was likewiſe urged, that this caſe was out of the words and meaning of the ſtatute; for the limitation here is to the wife in general tail; and on failure of iſſue of that marriage, her iſſue by any other huſband would have had the land, and might, without doubt, have ſuffered a recovery and barred the remainder; and the ſtatute only intended to provide for the iſſue of the huſband, whoſe the lands were: It was further urged, that theſe lands could not be ſaid the huſband's for the wife, by parting with her former ſettlement, which was 400*l. per ann.* for this of 150*l. per ann.* was a purchaſer of thoſe lands; and if the wife, in conſideration of this ſettlement had ſold lands of inheritance of her own, it would not have been within the ſtatute. On the other ſide it was ſaid that this was not to aid a forfeiture, but as the ſtatute makes the ſuffering a recovery a forfeiture, and gives an entry to the perſon that has the next eſtate, ſo in another place it makes all recoveries ſuffered

ſuffered by a jointreſs void; and upon that clauſe it is proper to come into equity, to have an execution of the truſt; and this caſe is within the words of the ſtatute, for the ſtatute ſays, any eſtate limited to the wife, or to her uſe; and this ſtatute was before the ſtatute *H.* 8. of uſes, at which time a uſe was the ſame thing that a truſt is now; next, the ſtatute ſays, limited for life, or in tail; now a general tail is as much an intail as a ſpecial one, and as much within the words of the ſtatute, and the ſtatute intended to provide for the remainder-man as well as the iſſue. The objection of her being a purchaſer, is quite to take away the ſtatute, for ſo is every jointreſs; and if ſhe had kept her former jointure, that had been under the ſame reſtrictions; and of the ſame opinion was my lord keeper, and decreed accordingly. *Trin.* 1700. *Simpſon* and *Turner.*

* 2. On a motion to ſtay a jointreſs, tenant in tail after poſſibility, *&c.* from commiting waſte; the court held, that ſhe being a jointreſs within the 11 *H.* 7. ought to be reſtrained, being part of the inheritance, which by the ſtatute ſhe is reſtrained from aliening, and therefore granted an injunction againſt wilful waſte. *Hil.* 1701. *Cook* and *Winford.*

3. If *A.* charges land in *D.* with a portion for a daughter by a firſt venter, and then marries, and ſettles part of thoſe lands as a jointure on a ſecond wife, who has no notice of the charge; and *A.* believing that the portion would take place of the jointure, by will gives other lands to the wife in lieu thereof; and the wife, by combination with the heir, refuſes to accept of the deviſe; the daughter ſhall hold the other lands which deſcended to the heir, till ſatisfied her portion. *Per North* lord keeper. *Hill.* 1683. *Reeve* and *Reeve*, 1 *Vern.* 219. 2 *Vent.* 363. S. C. and P.

4. If *A.* in conſideration of a marriage portion, articles to ſettle a jointure, and dies before the portion paid, or ſettlement made; and the wife takes out adminiſtration to him, and ſo becomes intitled to the money, and then brings a bill againſt the heir of the huſband, to have the jointure ſettled, ſhe ſhall have no relief, for ſhe is not entitled to the jointure and money too; but the reporter adds a *quære*; for ſhe is intitled to theſe two demands in diſtinct capacities, and debts may hereafter appear to exhauſt the aſſets; and in caſe the huſband had actually received the portion, and it had been in his poſſeſſion, ſhe would have had it as his adminiſtratrix. *Trin.* 1687. *Meredeth* and *Jones*, 1 *Vern.* 463.

5. But if *J. S.* before marriage, articles to ſettle a jointure on his intended wife, and the marriage is conſummated; and the huſband dies before any ſettlement made, an execution of the articles will be decreed in equity. 2 *Vent.* 343.

6. If *J. S.* gives a voluntary bond after marriage, to make a jointure to his wife, and he makes a jointure accordingly, and the wife gives up the bond, and the jointure is evicted, the jointure ſhall be made good out of the perſonal eſtate, there being no creditors; for the delivery up of the bond by a feme covert could no way bind her. *Hil.* 1686. *Beard* and *Nuthall*, 1 *Vern.* 427.

7. If a man covenants to ſettle lands of ſuch a value as a jointure, and this covenant is omitted in the ſettlement, yet it ſubſiſts in equity; but the value of the lands is not to be eſtimated according to the preſent value, but as they were at the time of the jointure ſettled, unleſs the covenant be ſo. *Hil.* 1683. *Speake* and *Speake*, 1 *Vern.* 217, 218.

8. If

8. If there be a jointreſs, and a covenant that her jointure ſhall be of ſuch a yearly value, and it falls ſhort; though her eſtate be not without impeachment of waſte, yet ſhe may commit waſte, ſo far as to make up the defect of the jointure, and equity will not prohibit. *Mich.* 1698. *Carew* and *Carew*, at the rolls.

2 *Freem.* 256. *Trin.* 1702. S. C. ſays, the plaintiff was relieved, the huſband having covenanted, that in caſe theſe lands were not ſufficient, it ſhould be made up out of other eſtates which he had a power of, altho' he was only tenant for life of them

9. *J. S.* made a ſettlement on his eldeſt ſon for life, with remainder to his firſt and other ſons in tail, remainder over, with power for his ſon to appoint any of the lands not exceeding 100*l. per Ann.* to any wife he ſhould afterwards marry, for a jointure, (the father being under an apprehenſion that he was then married to a woman which the father diſliked, and had no intention his ſon ſhould provide for); the father died, and the ſon married that woman (tho' there was ſtrong preſumptive proof that he was married to her before) and after marriage appointed certain lands to truſtees, in truſt for her, for a jointure, and covenants, that if they were not of 100*l. per Ann.* value, that upon requeſt made to him, any time during his life, he would make them up ſo much out of other lands in his power; he lived ſeveral years, and no complaint was made, that the lands were not of that value, nor requeſt to make it up, and died without iſſue. On a bill brought by the widow to have the jointure made up 100*l.* my lord keeper ſaid, that a proviſion for a wife or children was not to be conſidered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithſtanding the circumſtances of the caſe, and her neglect in not requeſting it during coverture, for the laches of a feme cannot be imputed to her. *Hil.* 1701. *Fothergill* and *Fothergill*, *Gilb. Hiſt. Chanc.* 248.

10. If *A.* in the life-time of his firſt wife, ſettles lands to the uſe of himſelf for life, remainder to his firſt and other ſons in tail, and the wife dies without iſſue; and *A.* on his ſecond marriage, in conſideration of a portion paid, agrees to ſettle part of the lands as a jointure on his ſecond wife, the court will ſet aſide the firſt ſettlement, as fraudulent againſt the jointreſs, who is a purchaſer for valuable conſideration. 1 *Chan. Ca.* 100.

11. If a feme covers joins with her huſband in a fine and mortgage of her jointure lands, there reſults a truſt for her when the mortgage is paid, to have the lands again. 2 *Chan. Ca.* 161.

12. So if a feme covert joins with her huſband in a mortgage of her jointure lands, ſhe may redeem; and if ſhe pays more than the third part of the principal money, her executor ſhall hold the lands till re-imburſed. 2 *Chan. Ca.*

13. So if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor ſhall hold over till re paid with intereſt. 1 *Chan. Ca.* 271. 2 *Vent.* 343. S. P. decreed

14. If the heir brings a bill againſt a jointreſs to diſcover deeds and writings, he is not intitled to ſee them, unleſs he confirms the wife's jointure, though the jointure was made after marriage. 1 *Vern.* 479.

15. So if a bill is preferred againſt a jointreſs to anſwer whether her huſband had any other title than as aſſignee of a mortgage, and ſhe denies that ſhe had any notice of this mortgage, and ſays, that her huſband told her that he was in bondicent; ſhe ſhall not be obliged to anſwer, whether her husband had any other title than as aſſignee of the mortgage. *Mich.* 1715. *Stephens* and *Guale*, 2 *Vern.* 701.

C A P

CAP. XXVIII.

Evidence, Witneſſes and Proof.

(A) *Of the Sufficiency and Diſability of a Witneſs.*
(B) *What will be admitted as Evidence, and will amount to ſufficient Proof.*
(C) *Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.*
(D) *Of examining Witneſſes, exhibiting Interrogatories, publiſhing and ſuppreſſing their Depoſitions.*
(E) *Of examining Witneſſes* de bene eſſe, *and eſtabliſhing their Teſtimony* in perpetuam rei memoriam.

(A) *Of the Sufficiency and Diſability of a Witneſs.*

1. A Exhited a bill to be relieved touching an annuity charged on the eſtate of the defendant's wife, and examined his brother as a witneſs for him, who had a like annuity charged on the eſtate by the ſame deed; and though it was urged, that he had ſatisfaction made to him in lieu of it, and had releaſed his right; yet it not appearing by any proof in the cauſe, the court put off the hearing, and gave the plaintiff liberty to examine witneſſes, to prove that the brother had releaſed the annuity before he was examined as a witneſs in the cauſe. *Trin.* 1700. *Culpeper* and *Fairfax*, 2 *Vern.* 375.

2. A witneſs was examined whilſt ſhe was intereſted, before the hearing; and the cauſe being heard, and decreed to an account, ſhe was re-examined after the hearing, before the *maſter* on the account, having firſt releaſed her intereſt; and it was objected, that ſhe ought not to be read, for having been examined whilſt intereſted, and her depoſitions publiſhed, ſhe was

Prec. in Chan. 234. S. C. under the name of *Callow* and *Mince*.

was thereby engaged, and almoſt under a neceſſity of ſtanding to what ſhe had before ſworn, and could not be free to retract or contradict it; but the lord keeper over-ruled the objection. *Mich.* 1704. *Callow* and *Mime*, 2 *Vern.* 472.

3. If a bankrupt has aſſigned and releaſed all his eſtate and right to the aſſignees, he may be examined as a witneſs for them. 2 *Vern* 637. *per curiam:* a legatee of a ſmall legacy, as 5*s.* to a private perſon, or 5*l.* to a nobleman, may be a witneſs for the will. 1 *Vern.* 254.

4. Upon an appeal from the rolls, it was objected to the evidence of one *Norris*, as a witneſs examined in the cauſe, and read at the hearing at the rolls, that ſince that hearing, in anſwer to a bill exhibited againſt him, he had confeſſed, that on the day on which he was examined as a witneſs, he took a bond of the plaintiff, that if the plaintiff recovered the eſtate in queſtion, he would convey part of it to the ſaid *Norris*; and *per* lord keeper, *Holt* Ch. Juſt. and *Powel* Juſt. this anſwer muſt be read to take off his evidence as a party intereſted. *Mich.* 1704. *Needham* and *Smith*, 2 *Vern.* 463, 464. And *per* lord keeper, though a witneſs is examined an hour together at law, if in any part of his evidence it appears that he was a party intereſted, the court will direct the jury, that he is no witneſs, nor any regard to be had to his evidence.

2 *Freem.* 259. S. C. but not S. P. *Vide Eq. Ca. Abr.* pt. 2.

5. Several perſons were examined as witneſſes no ways concerned in intereſt, and the cauſe heard, and iſſues directed to be tried, but the trials were not carried on, and the cauſe ſlept many years, and after abated; and then thoſe perſons who had been examined as witneſſes, became heirs at law, and thereby intereſted in the matter; the cauſe was revived and reheard, and the ſame iſſues directed to be tried; and the perſons who had been ſo examined (being now plaintiffs) prayed to have an order, that their depoſitions taken when they were diſintereſted, might be read as evidence at law for themſelves; and my lord keeper ordered it accordingly; and likened it to the caſe, where one is the only, or only ſurviving witneſs to a deed, becomes afterwards the party intereſted, his hand may be proved at law; ſo if a witneſs to a deed becomes blind, then the cauſe proceeded to trial at bar in *C. B.* where the whole court held theſe depoſitions could not be read without conſent, the parties being living; but the defendant conſented, and had a verdict for him; and the plaintiff obtained a new trial, and then would have had the ſame order; but my lord keeper ſaid, ſince the judges had reſolved otherwiſe, he could not take upon him to make that evidence which was not, and therefore only ordered they ſhould be read in evidence, as by law they might. *Trin.* 1702. *Holcroft* and *Smith.*

6. But where one who was examined as a witneſs when diſintereſted, and afterwards became intitled to the eſtate in queſtion, and the court of chancery allowed his depoſitions to be read, *vide* 2 (*a*) *Vern.* 699. and there ſaid, that the reaſon why the depoſition of a witneſs, taken whilſt unconcerned in intereſt, could not be made uſe of at law, was founded on that rule of law, *viz.* that where the witneſs is living, and might be produced at the trial, the depoſition of ſuch witneſs ſhall not be read.

(*a*) *Goſſe* and *Tracy*, 1 *Wil. Rep.* 287. *Preced. Chanc.* 123. S. C.

7. A co-plaintiff, though but a truſtee, cannot be examined as a witneſs for the other plaintiff. (*a*) 1 *Vern.* 230. But one defendant may be examined as a witneſs for another. 2 *Chan. Ca.* 214. S. P.

(*a*) *Vide* the Caſe of the Mayor and Aldermen of *Colcheſter*, *Eq. Ca. Abr.* Part 2. S. P.

8. Plaintiffs cannot examine each other as witneſſes in the cauſe, becauſe, if the cauſe miſcarries, the plaintiffs will be liable to coſts, and therefore their ſwearing is to exempt themſelves; and it is their own choice that they are made plaintiffs, for without their conſent they could not; but defendants are forced into the cauſe; and if their being made parties ſhould abſolutely invalidate their teſtimony it would be in the power of any one who had a mind to oppreſs another to deprive him of his defence, by making the moſt material witneſſes defendants in the ſuit; and therefore any of the defendants to a ſuit may be examined as witneſſes, ſaving juſt exceptions to their credit, &c. *Mich.* 1715. *Caſey* and *Beachfield*, agreed *per Curiam in Can'*.

Prec. in Chan. 411. S. C. *Gilb. Eq. Rep.* 98. S. C. *in totidem verbis* with *Prec. in Chan.* *Gilb Chnc.* 277

9. A commiſſioner may be a witneſs, but he ought to be examined before any other witneſs, 1 *Vern.* 369.

10. In a ſuit to ſet aſide a hard award, the arbitrator or umpire, who made the award, may be examined as a witneſs. 1 *Vern.* 157, 158.

11. A bond of 400*l.* penalty was entered into; and the queſtion was whether it was for the benefit of the corporation of ——— or for the defendants; and the witneſſes for the plaintiffs being all members of the corporation, it was objected, that they could not be read, they ſwearing for their own benefit; which exception was allowed; but it appearing that the defendant had croſs-examined ſome of the plaintiff's witneſſes, not only to queſtions barely whether they were of the corporation, or not, but to other queſtions, which tended to the merits of the cauſe; the lord keeper declared, that made them good witneſſes, though they were members of the corporation; and upon their evidence it was decreed for the plaintiffs. *Mich.* 1684. the corporation of *Sutton Coldfield* and *Wilſon*, 1 *Vern.* 254. And *per* lord keeper, a corporation ought to have a town-clerk and under-clerks, that are not freemen, that they may be competent witneſſes, upon occaſion; and he ſaid, that he thought it very hard in the caſe of the water-bailage of *London*, that no one freeman of the city, though it was not 6*d.* concern to him, could be admitted as a witneſs.

12. The ſuit being touching the loſs and miſapplication of a ſum of money given for the benefit of the pariſhioners, the queſtion was, whether any inhabitant of the pariſh ought to be admitted as a witneſs. For the plaintiff it was inſiſted, that the intereſt was ſo minute and inconſiderable, that it could not be preſumed to influence the witneſs, or biaſs him in his evidence; but *per Curiam*, the caſes where the party was concerned in intereſt, though never ſo ſmall, have always prevailed; and it was ſo reſolved, upon great debate, in the caſe of the city of *London*, concerning the water-bailiff. *Paſch.* 1694. *Dodſwell* and *Nott*, 2 *Vern.* 317.

Vide the Caſe of *The Attorney General* and *Wyburgh & al'*, *Eq. Ca. Abr.* Part 2. S. P. 192. Caſ. 8 & 397. Ca. 8

13. If an executrix to a firſt huſband marries a ſecond, and a bill is exhibited againſt them to diſcover a truſt, and they in their anſwers diſagree in the matter, the wife confeſſing what the huſband denies, and what the plantiff can prove only by one witneſs, the plaintiff can have no relief; for one witneſs is not ſufficient againſt

the huſband's anſwer; and the wife's confeſſion will not avail, for ſhe can be no witneſs againſt the huſband. 2 *Chan. Ca.* 39.

* 14. So where the plaintiffs, who were infants, and the children of the defendant's wife by a former huſband, exhibited a bill to have an account of the eſtate left them by their father, and of the produce thereof; and upon the hearing it was referred to an account, and the defendant and his wife were to be examined on interrogatories, for diſcovery of the eſtate; the wife being at variance with her huſband, and living a-part from him, on her examination made the eſtate of the plaintiffs, (who were her children) as great as ſhe could thereupon to fix a charge upon the huſband; the plantiffs, upon a petition to the maſter of the rolls, obtained an order to examine the wife as a witneſs againſt the huſband *de bene eſſe*; and the maſter, upon her evidence had charged the huſband with ſeveral ſums of money, as intereſt and produce of the infants eſtate; but upon exceptions to the report, the lord chancellor diſallowed her evidence, and declared the wife could not be a witneſs againſt her huſband. *Trin.* 1688. *Cole* and *Gray*, 2 *Vern.* 79.

* 15. The plaintiff was ſervant to the defendant's wife Mrs. *Baldwin*, and had in ſeveral ſervices ſaved about 50*l.* The defendant and his wife having ſome time lived ſeparate, the wife paſſed for a widow, and the plaintiff knew nothing of her being married; application was made to Mrs. *Baldwin* by one *Buſſey*, (who was likewiſe a defendant) to borrow 100*l.* on a mortgage; Mrs. *Baldwin* told him, ſhe could only let him have 50*l.* of her own money, but that ſhe could get the other 50*l.* of a young woman; accordingly, ſoon after, ſhe acquaints *Buſſey* that ſhe had got the 100*l.* and directed the mortgage to be made to herſelf by the name of *Pleabill*, that being her maiden name, though ſhe ſometimes went by the name of *Baldwin*, and at other times by the name of *Tuite*, having been the widow of one *Tuite*; the mortgage was made accordingly; and ſome time after ſhe gave the plaintiff a bond of the penalty of 100*l.* for payment of 50*l.* and intereſt, and this ſhe gave by the name of *Tuite*: *Buſſey* made ſeveral payments of intereſt to Mrs. *Baldwin*, and knew nothing of her marriage neither; afterwards Mr. *Baldwin*, having notice of the mortgage, gets that, and all the writings relating to it, into his cuſtody, and ſome time after Mrs. *Baldwin* obtained a ſentence of divorce from her huſband, upon pretence of ill uſage; and on diſcovery of the marriage, the bill was brought againſt the huſband and wife, and *Buſſey*, to charge this 50*l.* either on the mortgage, or upon the perſon of the huſband; the wife put in a ſeparate anſwer, wherein ſhe diſcloſed all the matter as above mentioned; *Buſſey* by his anſwer confeſſed what is before ſet forth, and moreover, that Mrs. *Baldwin* had told him lately, that the plaintiff was the young woman ſhe meant, and of whom ſhe had the 50*l.* The huſband by his anſwer, inſiſted upon his title by law to this mortgage and 100*l.* and denied to his knowledge, that 50*l.* or any part of it was the plaintiff's money, and ſaid he believ'd this ſuit to be ſet on foot, on contrivance between the plaintiff and his wife, to get ſo much money out of him; the plaintiff examined, by order of court, *Buſſey* as a witneſs, and his depoſition was in effect the ſame as his anſwer, which in truth was nothing more than an account of what he had heard the wife ſay on this occaſion, ſo that

the whole evidence was in effect the wife's; and whether that ſhould be allowed in this caſe, was the principal queſtion: the court agreed clearly, that the wife ſhall never be admitted by an anſwer or otherwiſe, as evidence to charge her huſband; as where a man marries a widow executrix, *&c.* her evidence ſhall not be allowed to charge her ſecond huſband with more than ſhe can prove to have actually come to her hands. But the maſter of the rolls ſaid this was perfectly a new caſe; for here ſhe tranſacted this affair with *Buſſey* and the plaintiff as a *Feme Sole*, and neither of them knew or had notice of the marriage; and the huſband himſelf, as was proved in the cauſe on ſome other occaſions, had given in to the concealment of the marriage; and therefore the court did allow of her evidence, as it was ſupported by what *Buſſey* ſaid; and thought, upon the whole, the evidence of the wife ſufficient to prove 50*l.* part of this money, to be the plaintiff's, not conſidered as a wife, but as ſhe tranſacted and appeared throughout as a feme ſole, and therefore decreed the plaintiff the 50*l.* with coſts. *Hil.* 1719. *Rutter* and *Baldwin*.

(B) *What ſhall be admitted as Evidence, and will amount to ſufficient Proof.*

1. A Bill in another cauſe is not to be read as evidence againſt the plaintiff named in it, unleſs it be proved, that it was exhibited with his privity, for any one may file a bill in another's name. 17 *Car.* 2. *Wollett* and *Roberts*, 1 *Chan. Ca.* 64.

2. The depoſitions of witneſſes taken in a cauſe, which was heard *thirty years* before, were ordered to be made uſe of, the ſame matters being then under examination as at preſent; and the plaintiff's title not then appearing, and the witneſſes being ſince dead, though none of the preſent parties were parties to the former ſuit, except the tertenants. *Paſch.* 18 *Car.* 2. *Terwit* and *Greſham*, 1 *Chan. Ca.* 73.

2 *Freem.* 184. S. C. ſays, it was ſo ordered upon a long Debate.

3. Where the defendant's counſel moved, that they might be at liberty to read depoſitions in this cauſe, which were taken in a cauſe where the plaintiff's father was a party to the ſuit, being in all matters the ſame; but on the other ſide it was objected, that the now plaintiff not claiming as heir, and his father being only tenant for life, thoſe depoſitions could not be read againſt him; and upon long debate, the defendant had only the common order, for leave to read thoſe depoſitions at the hearing, ſaving juſt exceptions. *Mich.* 1686. *Coke* and *Fountain*, 1 *Vern.* 413. And it was ſaid to be a common caſe, that where one legatee has brought his bill againſt an executor, and proved aſſets; and afterwards another legatee brings his bill; that he ſhould have the benefit of the depoſitions in the former ſuit, though he was not party to it.

4. So where *J. S.* deviſed his real eſtate for the payment of his debts, and the ſurplus to the plaintiffs, and the creditors exhibited a bill againſt one *J. N.* and made the plaintiffs parties, to ſet aſide ſome conveyances obtained by him, by fraud from the teſtator, and had a decree to that purpoſe; afterwards the plaintiff's who were entitled to the ſurplus, exhibited a bill likewiſe againſt *J. N.* relating to the ſaid fraud; and it was held, that there being the ſame queſtion in both cauſes, and *J. N.*'s defence being the ſame, that the depoſitions in the former cauſe ſhould be read againſt him.

Mich. 1703. *Nevill* and *Johnſon*, 2 *Vern.* 447. That a man's anſwer in the ſpiritual court, or voluntary oath before a juſtice of the peace, may be read againſt him in chancery, by order, *vide* 1 *Vern.* 53.

* 5. The defendant, on preſenting the plaintiff to a living, took a bond from him to reſign, and after put it in ſuit, and recovered, and levied 98*l.* and the plaintiff's bill was for relief; the defendant did not by anſwer pretend any miſbehaviour, yet examined to ſeveral miſbehaviours; and it was urged that theſe depoſitions could not be read, becauſe thoſe miſbehaviours were not in iſſue; and ſo inclined my lord keeper; but after allowed them to be read, and founded his decree on them. *Hil.* 1702. *Hodgſon* and *Thornton*.

6. The defendant having obtained a bill of ſale of goods, and likewiſe a note from his brother, a little before his death, for payment of 300*l.* the plaintiff inſiſted thoſe were voluntarily given, and for a colour only; and that underneath the note, defendant had ſubſcribed an acknowledgement, that no debt was due to him; the defendant by anſwer ſwore his debt, and denied that there was any ſuch defeaſance or acknowledgment; it appeared upon the proof, that the defendant depoſited the two inſtruments he had ſo obtained in the hands of *A. B.* his ſiſter, and afterwards wrote to her to ſend him the two inſtruments by a ſpecial meſſenger ſent for that purpoſe, and that ſhe ſhould not let any body ſee them; his ſiſter ſent them, but ſat up all night to take copies of them, as ſhe declared in her life-time (being dead before the commencement of the ſuit); and upon producing the copies ſo taken by the ſaid *A. B.* there appeared to be ſuch acknowledgment under-wrote, that there was no real debt; and upon inſpecting the inſtruments produced by the plaintiff upon ſtamp'd paper, it appeared that the bottom was torn off; and my lord chancellor allowed the copies to be read, being the hand writing of *A. B.* although not proved to be true copies. *Hil.* 1707. *Winne* and *Loyd*, 2 *Vern.* 603.

7. A deed to lead the uſes of a fine was inrolled for ſafe cuſtody only, and a copy from the inrolment being offered in evidence, it was objected, that it was no evidence, being inrolled for ſafe cuſtody only; nor is the enrolment it ſelf, without particular circumſtances to ſupport it, as proving the original deed was in the defendant's cuſtody or power, or accidentally loſt, *&c.* and of that opinion was the maſter of the rolls, who ſaid that in caſe of an inrolment for the ſafe cuſtody, the deed may be ſaid to be recorded; but where a bargain and ſale is inrolled purſuant to the ſtatute, the inrolment is a record, ſo that a copy of it may be read in evidence. *Mich.* 1704. *Combes* and *Spencer*, 2 *Vern.* 471. The reporter adds a *Note*, that afterwards, upon a rehearing, an iſſue at law was directed, whether ſuch deed of uſes was executed; and upon the trial, a copy of the deed was allowed to be read, and a verdict for the deed. 2 *Vern.* 591. S. C.

8. The defendant having ſuppreſſed a marriage-ſettlement, by which a remainder in tail male was limited to the plaintiff's father, and all the prior eſtates ſpent; upon proof made that the ſettlement came to the defendant's hand, and that he had confeſſed it to an anſwer to a former bill, though now he denied it; the maſter of the rolls decreed the plaintiff ſhould hold and enjoy the eſtate; and

this decree was confirmed by my lord keeper. 2 *Vern.* 380. *Vide* 1 *Vern.* 452. S. P.

9. A bill was exhibited touching the plaintiff's jointure, which the bill charged was, by parol agreement, made on the marriage, agreed to be 400*l.* *per annum*; the defendant pleaded, that after all treaties and agreements touching the marriage-ſettlement, a jointure was actually ſettled and accepted, and the marriage thereupon had eighteen years before: and *per* lord chancellor, the jointure deed is an evidence, that all the precedent treaties and agreements were reſolved into that; but ordered the defendants to anſwer, and ſaved the benefit of the plea to the hearing. 1 *Vern.* 369. *Ballaſis* verſus *Benſon.*

10. The plaintiff having lent *J. S.* 600*l.* on a mortgage, and afterwards diſcovering that the eſtate was pre-mortgaged to the defendant, got in an old ſatisfied incumbrance, and brought his bill to compel the defendant to redeem, or be foreclоſed; and it was objected, that the plaintiff, in this caſe, (as between him and the defendant, who was a purchaſer,) ought to have proved the actual lending and payment of the conſideration-money; and the producing the deed or an acquittance was not ſufficient; but the court held it well enough, and that the producing the deed or acquittance was ſufficient evidence. *Mich.* 1692. *The Lord Chief Juſtice Holt* and *Mill*, 2 *Vern.* 279. *Vide* 1 *Vern.* where, by the maſter of the rolls, there are four things favoured in equity, *viz.* livery, attornment, aſſent to a legacy, and the new publication of a will, and in either of theſe caſes a ſlender evidence will ſerve the turn.

11. Some bailiffs, who had ſerved an execution in breach of an injunction, find money hid in the houſe, and carry it away; and the party, at whoſe ſuit the execution was taken out, was ordered to make ſatisfaction, who complained of this order as unjuſt, ſaying, that the parties ſhould be admitted to purge themſelves by oath, and that the plaintiff ſhould be admitted to be judge of his own damages; but my lord chancellor confirmed the order, and ſaid, that a man who had ſtolen, would not ſtick to forſwear it; and that therefore, *in odium ſpoliatoris*, the oath of the party injured ſhould be a good charge on him who did the wrong. 2 *Vern.* 207, 308. S. C. cited. *Childerns* verſus *Saxby.*

12. If there be but one witneſs againſt the defendant's anſwer, the plaintiff cannot have a decree, it being oath againſt oath. *Paſch.* 1683. *Alam* and *Jourdon*, 1 *Vern.* 161. 3 *Chan. Ca.* 123. S. P.

13. The defendant denied notice of the plaintiff's title, the plaintiff proved it by one witneſs, which by the uſage of this court, is not ſufficient to ground a decree for the plaintiff, being oath againſt oath; but the courſe has been to direct a trial at law; but in this caſe my lord keeper ſaid, he did not ſee the difference between doing *per Plura* and *per Pauciora*; for to ſend it to law to be tried, where the jury will certainly find it on the teſtimony of one witneſs, and then decreeing it on that verdict, is the ſame thing as decreeing on one witneſs, without trying it at all, and therefore directed it to be tried: but that the plaintiff ſhould admit the defendant's anſwer to be read at the trial, not as evidence, for that he ſaid he could not be, nor ſhould they admit it to be true; but to be ſworn, ſo that the defendant might have the benefit of his oath at law.

law as in this court, if it would weigh any thing with the jury. *Paſch.* 1706. *Ibbotſon* and *Rhodes*, *vide* 2 *Vern.* 554. S. C.

(C) *Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the face of a Deed or Will.*

2 *Freem.* 188. S. C.—1 *Will. Rep.* 9 & 116. S. C. cited.

Vid. 2 Bac. Abr. 425, 6
2 P. Wms. 160
2 Atk. 68
3 Atk. 375
1 Wil. 313
2 Ver. 28

1. THE Earl of *Gainſborough* made his will, and thereby deviſed ſeveral legacies, and charged his real eſtate with the payment of them and his debts, and deviſed his eſtate ſo charged to the defendant his nephew, and made the plaintiff his wife executrix; and the bill was brought to have the perſonal eſtate diſcharged from the debts and legacies, ſuggeſting, that the creditors threatned to come upon and exhauſt the perſonal eſtate, and that it was the intent of the teſtator, that ſhe ſhould have the perſonal eſtate clear to herſelf, and that the directions for making the will were ſo; but that either by the miſtake or contrivance of the perſon who drew the will, it was not ſo expreſſed; the defendant demurs, for that no ſuch averment could or ought to be admitted againſt the will in writing; but by *Rawlinſon* and *Hutchins* the demurrer was over-ruled; and they ſaid, that though ſuch an averment could not be *(a)* admitted, where it was to make the party a title, yet where it was only to rebut an equity, as it is in this caſe, it might; and cited the caſe of *Crompton* and *North*, 1 *Chan. Ca.* 196. where Mrs. *Crompton* deviſed her lands to ſir *H. North*, to be ſold for payment of her debts, which were very ſmall, and the heir would have had the ſurplus a truſt for him; and the court was of opinion, that ſir *H. North* might be admitted to prove Mrs. *Crompton's* intent otherwiſe; and the caſe of *King ſmill* and *Ogle*, 8 *May*, 17 *Car.* 2. and *Foſter* and *Munt*, and *Pring* and *Pring*, 2 *Vern.* 99. Afterwards the cauſe coming on to be heard, on the proofs it appeared plainly that my lord's intention was, that ſhe ſhould have the perſonal eſtate clear of the debts; which was decreed accordingly; and that if it were taken from her by the creditors, ſhe ſhould come in as a creditor on the real eſtate; and 27 *Feb.* this decree was affirmed in the houſe of peers. *The Counteſs* and *Earl of Gainſborough*, 2 *Vern.* 252. S. C. 677.

(*a*) The conſtant rule of law has been, to reject all parol proof brought to ſupply the words of a will, or to explain the intent of the teſtator, and that nothing *debors* ſhould be averred, is the expreſs reſolution in Lord *Cheyney's* caſe, 5 *Co.* 67. and this rule has ſince been thought neceſſary to be adhered to, not only on account of the ſtatute of *frauds* and *perjuries*, which was made to prevent perjury, contrariety of evidence, and uncertainty; but becauſe little regard ought to be had to the expreſſions of the teſtator, either before or after the making his will; becauſe poſſibly thoſe expreſſions might be uſed by him, on prurpoſe to controul or diſguiſe what he was doing, or to keep the family quiet, or for other ſecret motives and inducements, which cannot after his death be found out; but this rule has received a diſtinction which has greatly prevailed of late, *viz.* between evidence offered to a court, and evidence offered to a jury; for in the laſt caſe, no parol evidence is to be admitted, leſt the jury might be inveigled by it; but in the firſt caſe it can do no hurt, being to inform the conſcience of the court, who cannot be biaſſed or prejudiced by it. *Vide* 2 *Vern.* 98, 337, 625.

2. So where *J. S.* deviſed all his houſehold-goods, as woollen, linen, pewter and braſs whatſoever, except a trunk under the chamber-window; and the queſtion was, whether the parol proof of the perſon who drew the will, ſhould be admitted to explain

theſe

theſe words; and my lord keeper thought it might, notwithſtanding the ſtatute of *Frauds* and *Perjuries;* for it here neither adds to, nor alters the will, but only explains which of the meanings ſhall be taken; as in caſe of a deviſe to ſon *John*, when the teſtator had two of the ſame name; and here the word (*As*) may be a reſtriction, or if the following be as particular inſtances, it may not reſtrain the word (*whatſoever*); and he thought the words imported to carry all the houſhold-goods; and the maſter of the rolls being of that opinion too, the proof was read. *Mich.* 1705. *Pendleton* and *Grant*, 2 *Vern.* 517. S. C.

3. *J. S.* having three daughters, and ſeveral grandchildren and great grandchildren, made his will, and deviſed the ſurplus of his eſtate to be equally divided amongſt his three daughters, and all his grandchildren and great grandchildren, that ſhould be living within two years after his death, and died; and within two years after his death other grandchildren were born; the plaintiffs examined witneſſes to prove *J. S.*'s intent, that none born after his death ſhould take; and the queſtion was, whether they could be admitted to read this proof; and my lord keeper was of opinion, that ſuch proof might be admitted; ſo the witneſſes were read; but their depoſitions were only, that *J. S.* ſaid ſo or ſo, or to that effect, which my lord ſaid ſignified nothing, for that makes the witneſs the judge; and he ought to ſet down the very words for the court to judge of; but without this proof, my lord held, that the words in the will (within two years after my death) were to be taken reſtrictively, and extended to none born after; and decreed accordingly; which decree was affirmed in the houſe of lords. *Trin.* 1700. *Doyrell* and *Molſeworth*.

2 *Vern.* 378. S. C. reported on another Point.

4. The teſtator made his will, and his brother executor, and deviſed to him his real eſtate, and thereby willed that his executor, out of his rents in arrear, and other his perſonal eſtate, and out of half a year's rents and profits of his real eſtate, after his death, ſhould pay his debts and legacies therein after-mentioned, and amongſt other legacies deviſed 40*l. per annum* to the plaintiff, his wife's nephew, to maintain him at *Cambridge*, to be paid by his brother and executor; the brother alledging, that he had fully adminiſtred the perſonal eſtate, and alſo the half year's profits of the real which incurred after the teſtator's death, refuſed to pay the 40*l. per ann.* and though it was admitted, that the will had only made the half year's rents and profits of the real eſtate liable; yet upon the evidence of one *J. N.* who ſwore that the brother promiſed the teſtator, that he would pay the plaintiff the annuity, it was decreed for him by the maſter of the rolls, and confirmed by my lord keeper. *Trin.* 1705. *Oldham* and *Litchford*, 2 *Vern.* 506. (*a*)

2 *Freem.* 284. *Eaſter* 1705. S. C. reports it that Teſtator was making his Will, and amongſt other things was directing this gift to the plaintiff to be inſerted in his will, and defendant being preſent deſired him not to put it in his will, but ſaid as he was a Chriſtian he would take care to ſee it paid, and thereupon it was omitted in the will; and plaintiff having preferred his bill for it, the Maſter of the Rolls decreed the payment, and that it ſhould be charged on the real eſtate; and on appeal Lord Keeper decreed, that the defendant ſhould pay it, and ſaid the ground he went upon was, that this was a fraud upon the teſtator and the legatee, and that notwithſtanding the ſtatute of frauds, this court had relieved in caſe of a fraud, although there was nothing in writing to charge the party, but he ſaid he could not decree it as a charge upon the land; but the Maſter of the Rolls ſaid the reaſon he went upon to charge the land was, becauſe the maintenance of a poor ſcholar was a charity, and within the 43 *Eliz.* of Charitable Uſes, and it might amount to an appointment within that ſtatute. (*a*) Mr. *Vernon* does not give the reaſons the court went upon, but perhaps the court looked upon the promiſe of the executor as a confeſſion of aſſets. *Per Hardwicke* C. in the caſe of *Whitborne* and *Ruſſel*, *Trin.*

12 *Geo.* 2. But it ſeems clearly expreſſed in *Vern.* that the decree was founded on the fraud of the Executor as proved by the evidence; and how could the promiſe of the Executor, being in the life-time of the Teſtator, be deemed any confeſſion of future aſſets? But on account of the deceitful promiſe, the decree was, that the real eſtate ſhould be charged with the legacy, as it would have been if the fraud of the Executor had not prevented its being expreſſed in the will. And Query, How, even if the Executor's promiſe had been taken as a confeſſion of aſſets, that could have been a foundation for a particular decree againſt the real eſtate, and not a general one againſt the Executor, as in the general caſe of an admiſſion of aſſets?

Precedents in Chan. 229. S. C. ſtates it thus: *A.* deviſed lands to *B.* he paying 100*l.* which he owed by bond to *J. S.* which was the obligee's maiden name; but though he knew ſhe was married, yet he forgot her huſband's name; and this being proved by the perſon that drew the will and another, the payment was decreed.

5. *A.* deviſed to *B.* lands of 60*l. per. annum* value, paying 100*l.* which he owed *J. S.* and 100*l.* more which he by bond owed *J. N.* and after ſome ſmall legacies, deviſed the reſt of his perſonal eſtate to the plaintiffs his nieces; it happened that the 100*l.* by bond was not due to *J. N.* but to *S. H.* and therefore the deviſee of lands refuſed to pay it, inſiſting it ſhould be paid out of the perſonal eſtate; but the perſon who drew the will having ſwore that the teſtator intended the debt due to *S. H.* the maſter of the rolls decreed the deviſee of the lands liable; which decree was affirmed by my lord chancellor, who ſaid, he ſaw no hurt in admitting collateral proof to make certain the perſon or the thing deſcribed. *Mich.* 1707. *Hodgſon* and *Hodgſon*, *Vern.* 593.

6. *A.* deviſed to his wife ſome particular legacies, and made her executrix, but made no diſpoſition of the ſurplus of his perſonal eſtate; and the court admitted parol proof to ſhew that the teſtator intended her the ſurplus, being to ouſt an implication or rule in equity; and on the evidence decreed for the wife. 2 *Vern.* 648, 736. S. P. *(a)* parol proof admitted, to ſhew that a legacy greater than a debt due to the legatee was not in ſatisfaction of the debt. 2 *Vern.* 593, 594.

7. If *A.* purchaſes in the name of *B. A.* may be admitted to prove that he paid the purchaſe-money, and ſo make it a reſulting truſt, or truſt by implication of law for himſelf. 1 *Vern.* 366.

(a) Vide the Caſe of *The Duke of Rutland & al*ª and *Dutcheſs of Rutland & al*ª. *Eq. Ca. Abr.* Part 2. S. P.

8. An entry in the ſteward's book, and a parol proof by the foreman of the jury, admitted as good evidence, that a feme covert ſurrendered her whole eſtate, although the ſurrender upon the roll, and the admiſſion thereon, was but of a moiety. *Paſch.* 1706. *Hill* and *Wigget*, 2 *Vern.* 547.

(D) *Of examining Witneſſes, exhibiting Interrogatories, publiſhing and ſuppreſſing their Depoſitions.*

1. A Maſter examined one witneſs three times to a matter of account, and the depoſitions were ſuppreſſed. 2 *Chan. Ca.* 79.

2. If an interrogatory is leading, that is ſufficient to ſuppreſs the depoſition. 2 *Vern.* 472.

Gilb. Eq. Rep. 150. S. C. *in totidem verbis. Pr. in Chan.* 493. S. C. *in totidem verbis.*

3. Interrogatories, and the depoſitions of a witneſs taken on them, had been ſuppreſſed, for that the interrogatories were leading, and then publication paſſed; and the court was moved, that a new ſet of interrogatories might be drawn, and ſettled by the maſter, for the examination of this witneſs, whoſe evidence was very material, and yet muſt be wholly loſt unleſs the court would indulge them this way; and though the practice was admitted to be always againſt it; and it was urged to be of dangerous conſequence; yet one precedent being produced to this purpoſe, and the interrogatories which had been ſuppreſſed being ſuch as might be drawn by many other counſel, without an apprehenſion of their being leading; the court, to let in the party to the benefit of his witneſſes teſtimony,

ordered

ordered interrogatories to be put in and ſettled by a maſter, for his examination over again. *Trin.* 1718. *Spence* and *Allen.*

4. Though the rule be that after publication no new witneſs can be examined, nor a witneſs before examined re-examined; yet on ſpecial circumſtances ſet forth by motion and affidavit the rule may be diſpenſed with. 1 *Chan. Ca.* 228. 2 *Chan. Ca.* 75. 1 *Chan. Ca.* 25.

5. Upon a motion for leave to examine after publication upon making the uſual oath of not having ſeen the depoſitions, the lord keeper declared, that in ſuch a caſe, the other ſide ſhould be at liberty to examine at large as well as croſs examine the witneſſes produced by the party that made the motion, (which was all he might do formerly) and his reaſon was, that a crafty ſolicitor may lie on the lurch, and examine nothing till after publication is paſt; and the other party may think himſelf ſecure, and ſo not examine to thoſe points, which he could otherwiſe have proved, in regard he finds his adverſary has not examined to thoſe matters: And when once publication is paſt, and the party that examined has ſeen his own depoſitions, then the ſide that lay ſtill having tied up his adverſary, ſo that he can only croſs examine the other's witneſſes, applies for an order upon the uſual affidavit to inlarge publication; and when he has got that order, then he comes in with a whole cloud of witneſſes: And though it may be thought hard that any one ſhould have liberty to examine after he has ſeen the depoſitions, yet his lordſhip thought it a reaſonable penalty on ſuch as would not examine in time, or that ſhould lie on the catch, to take advantage of the other party, and ordered the regiſter to take notice of it as a fixt rule for the future. *Mich.* 1684. 1 *Vern.* 253.

6. If interrogatories are exhibited in the Examiner's office, and witneſſes examined thereon, either party may without application to the court, or order for that purpoſe, exhibit one or more interrogatories, or a new ſet of interrogatories, for further examination of the ſame or other witneſſes: But when a commiſſion is taken out, there no new interrogatories, or ſet of interrogatories, can be exhibited without motion and order of the court; and the reaſon of the difference is, becauſe the examiner is an officer of credit, and ſworn, and therefore preſumed to be impartial, and that he will not diſcloſe the depoſitions; whereas commiſſioners are private perſons, and therefore without leave of the court no new interrogatories can be added before them; agreed by the court and bar. *Paſch.* 1714. *Andrews* and *Brown.*

Prec. in Chans. 386. S. C. and P. *Gilb. Rep.* 42. S. C. and P. Brown's Rep 388.

(E) *Of examining Witneſſes* de bene eſſe, *and eſtabliſhing their Teſtimony* in Perpetuam rei Memoriam.

1. A Cauſe having been heard, and referred to an account, the plaintiff afterwards moved to examine two of the defendants *de bene eſſe*, which was ordered, unleſs cauſe was ſhewn; and the defendant's counſel in ſhewing cauſe took this difference, *viz.* that altho' it was in (*a*) order of courſe to examine a defendant *de bene eſſe*, ſaving juſt exceptions; yet when the cauſe was

(*a*) After a Bill filed in any Cauſe, the Court will, on Affidavit, that any of the Witneſſes are aged or infirm, ſick, or going beyond Sea, ſo that the Party is in Danger of loſing their Teſtimony, order them to be examined

de

de bene eſſe, which will make their Depoſitions valid in that Cauſe only, and againſt thoſe who are Parties to it; but if it appear, that they might afterwards have been examined in Chief, regularly, ſuch Depoſitions ſhall not be made uſe of: To eſtabliſh Teſtimony *in Perpetuam rei Memoriam*, a Bill muſt be filed againſt all thoſe concerned in Intereſt, ſetting forth the Title and *that the party is in danger of loſing the Benefit of the Teſtimony of ſeveral Witneſſes by their Age, Sickneſs*, &c. (*b*) And the Depoſitions taken in ſuch a Caſe will not only bind the parties in that and all other Suits, but likewiſe all thoſe claiming by or from them. *Vide Stile's Pract. Reg.* 587. (*b*) *Vide* the Caſe of *Philips* and *Carew*, *Eq. Ca. Abr.* Part 2. S. P.

open, and it appeared that the defendants were parties intereſted, it was proper to ſhew it as cauſe againſt ſuch an order before the witneſſes were examined; which difference was allowed of; but it appearing in this caſe, that the defendants had given releaſes of their right, the cauſe was diſallowed. *Paſch.* 1687. *Glover*, and *Faulkner*, 1 *Vern.* 452.

2. The plaintiff examined his witneſſes *de bene eſſe*, in *Mich.* vacation, and in *Hil.* term following, the defendant put in his anſwer; and five weeks afterwards, before any replication filed, or examination in chief, the witneſſes died; and it was moved, that this depoſition might be read; and it was likewiſe prayed, that it might be made uſe of at law (altho' by the ſtrict rules of the (*a*) common law, no depoſitions of witneſſes taken *de bene eſſe*, or before Iſſue joined, can be read or given in evidence) and that the defendant might be ordered not to oppoſe the reading of it at the trial there; which my lord keeper held reaſonable; for that otherwiſe an examination *de bene eſſe* would be to no purpoſe. 1 *Vern.* 361.

(*a*) Whether ſuch Evidence ought to be admitted at Law, *vide* 1 *Salk.* 278; 2 *Salk.* 555, 691. *Cro. Eliz.* 352. *Hard.* 332. *Raym.* 335. *Hob.* 142. *Godb.* 336.

3. If one makes a will, and afterwards becomes a Lunatic, a bill will not lie to perpetuate the teſtimony of the witneſſes to it in the lunatic's life-time. 1 *Vern.* 105

4. If there are two perſons and each of them pretends to be the purchaſer of a reverſion after an eſtate for life, and one of them exhibits his bill to try his title, and to perpetuate the teſtimony of his witneſſes; ſuch bill will be diſmiſſed, not being proper in the life-time of tenant for life. 2 *Vern.* 159.

5. A bill was exhibited to examine witneſſes *in Perpetuam rei memoriam*, to prove a *Modus Decimandi*; the defendant demurred, for that the bill was to eſtabliſh a cuſtom againſt the church, and in prejudice of tithes, which are due *Communi Jure*; and ſeveral precedents were cited, where bills to have a *Modus* decreed were upon a demurrer diſmiſſed: but this bill being only to preſerve teſtimony, the lord keeper thought it reaſonable the defendant ſhould anſwer, and over-ruled the demurrer. 1 *Vern.* 185. *Vide* 1 *Vern.* 308, 441.

6. But where a bill was exhibited to prove a will, and to perpetuate the teſtimony of the witneſſes, the defendant pleaded himſelf a purchaſer without notice of any ſuch will; and inſiſted, that unleſs there had been a verdict in affirmance of ſuch will, (nothing hindering the plaintiff, but that if he had a title, he might recover at law) the plaintiff ought not to be admitted to examine the witneſſes, thereby to hang a cloud over a purchaſer's eſtate; and upon debate the court allowed the plea. *Hil.* 1685. *Bechinal* and *Arnold*, 1 *Vern.* 354.

CAP.

CAP. XXIX.

Executors and Adminiſtrators.

For this head, *Vid.* 2 *Bac. Abr.* 371.

(A) *Executors, in what Caſes more or leſs favoured in a Court of Equity, than elſewhere.*
(B) *What ſhall be Aſſets.*
(C) *When upon the Death of one of the Executors, the Surplus of the Perſonal Eſtate, after Debts and Legacies paid, ſhall ſurvive to the other.*
(D) *Where the Surplus of the Perſonal Eſtate belongs to the Executor, or he is to be a Truſtee for the next of Kin to the Teſtator:*
(E) *Of Remedies by one Executor againſt another, and how far the one ſhall be anſwerable for the other.*
(F) *Of Adminiſtration, to whom to be granted, who are entitled to a Diſtribution, and in what proportion; and here of bringing into Hotch-pot.*

(A) *Executors, in what Caſes more or leſs favoured in a Court of Equity than elſewhere.*

A. By will gave the three children of *B.* (the eldeſt of whom was not ten years old) 200*l.* *B.* the father, ſued the executor in the *Conſiſtory Court* for theſe legacies, who brought his bill, offering to pay them, provided he might be indemnified; to which the father demurred, becauſe the matter was properly cogniſable in the *Conſiſtory Court:* but the demurrer was over-ruled; my lord chancellor declaring, that the matter was proper here, and that if the matter had proceeded to a ſentence in the eccleſiaſtical court, it would be proper to come here for the executor's indemnity; and that here legatees were to give ſecurity to refund, but not there; and this court will ſee the money

ney put out for the benefit of the children. *Hil.* 1681. *Horrel* and *Waldron*, 1 *Vern.* 26.

If the ſpiritual court go about to compel an executor to pay a legacy without ſecurity to refund, a prohibition ſhall go. 1 *Vern.* 99 *per* lord chancellor.

3. The plaintiff being executor, and his teſtator greatly indebted, and being deſirous to be rid of the aſſets, as far as they would go, and that his payments might not be afterwards queſtioned, brought a bill againſt all the teſtator's creditors, to the intent they might, if they would, conteſt each other's debts, and diſpute who ought to be preferred in payment: the defendant being a creditor demurred, for that the bill contained multiplicity of matter, wherein he was not concerned; but the court overruled the demurrer, and held it a proper bill, and a ſafe way for the executor to take. 2 *Vern.* 37.

4. A widow poſſeſſed herſelf of her huſband's perſonal eſtate, and paid ſeveral of his debts, and after his executor got the eſtate out of her hands; and upon a bill preferred by her, it was decreed by conſent of counſel, that ſhe ſhould be allowed for all payments made, which were incumbent on the executor to pay, according to the courſe of law; but as to payments made out of order and rule, which the law left the executor liable to, ſhe ſhould not be allowed, if they were to the prejudice of the executor. 15 *Car.* 2. *Ayer* and *Ayer*, 1 *Chan. Ca.* 33.

5. If a widow poſſeſſes herſelf of the perſonal eſtate as executrix under a revoked will, and pays debts and legacies, but has no notice of the revocation, ſhe ſhall be allowed thoſe payments in equity. *Vide* 1 *Chan. Ca.* 126.

6. But where an adminiſtrator poſſeſſed himſelf of the inteſtate's goods, and deviſed legacies and died, and his executor, without compulſion, and pending a ſuit in right of the inteſtate to recover the goods, paid the legacies; and the court will not relieve him, becauſe the payment was voluntary, and with notice, that the right to the inteſtate's goods was controverted. 31 *Car.* 2. *Hodges* and *Waddington*, 2 *Chan. Ca.* 9.

7. If an adminiſtrator exhibits a bill for a diſcovery of the perſonal eſtate of the inteſtate, and the defendant pleads, that the party made a will, and that it is now litigated in the ſpiritual court; yet equity will decree a diſcovery. *Mich.* 1682. *Wright* and *Blicke*, 1 *Vern.* 106.

8. If three ſeveral actions at one time are brought againſt an executor, and he to each action pleads *Riens entre maines ultra* 100 *l.* and ſo upon each action there is judgment for 100 *l.* and therefore prays an injunction; yet *per* lord keeper, he can have no relief; for in caſes proper for law, a man muſt defend himſelf by legal pleadings: and every executor ought to be careful in the firſt place to cover his aſſets with a judgment. 1 *Vern.* 119.

9. So where an adminiſtrator exhibited a bill to be relieved after a ſpecial *Plene adminiſtravit* pleaded; and a verdict and judgment thereon, upon pretence that the attorney at law, without direction pleaded, that the defendant had not notice of the original, until the 12th of March, and had then fully adminiſtered; and iſſue taken, that the defendant had notice before the 12th, *viz.* the 6th of *March*; whereas in truth he had fully adminiſtred before the

6th

6th of *March*, and before the original purchaſed, ſo that the right was never tried at law; yet the bill was diſmiſſed at the rolls, and the diſmiſſion affirmed upon an appeal to the lord keeper. *Mich.* 1695. *Stephenſon* and *Wilſon*, 2 *Vern.* 325.

10. But where an executor exhibited a bill to be relieved againſt a judgment obtained againſt him, and ſurmiſed that he gave direction to his attorney to plead ſpecially, that he had not aſſets *ultra* what would ſatisfy debts of a higher nature; but that the attorney pleaded generally *Plenement Adminiſt.* and on the iſſue, a letter which he had been perſuaded to write by the importunity of the defendant's friends, giving an account of the teſtator's eſtate, and in which was an acknowledgment of 300*l.* due to the teſtator on a mortgage, was given in evidence, and held ſufficient by the court and jury to charge him; but he proving that this mortgage was worth nothing, there being three precedent mortgages on the ſame eſtate; and that he had notice of it at the writing of the letter; the court relieved him. *Trin.* 1690. *Robinſon* and *Bell*, 2 *Vern.* 146, 147.

11. In debt againſt an executor for 700*l.* the executor pleaded *Ne unques Executor*, and on proving at the trial, that a chimney-back, or ſome other ſlight thing came to the defendant's hands, the plaintiff had a verdict; but equity relieved againſt it; cited by *Hutchins* lord commiſſioner, to be adjudged in lord *Bacon's* time. 2 *Vern.* 147. 2 Bac. Abr. 390.

12. So in another caſe upon the like plea of *Ne unques Executor*, the plaintiff proved the defendant took money for a pot of ale, ſold by the teſtator in his life-time; and equity relieved. *Cryer* and *Goodhand*, 2 *Vern.* 148. cited by *Hutchins* lord commiſſioner, to be adjudged by lord *Nottingham*.

13. The executor of an executor ſhall be liable in equity for any waſte or wrong done by his executor; although at law it is conſidered as a perſonal tort, which dies with the executor. 2 *Chan. Ca.* 217. *per* lord chancellor.

14. An executor of an executor is not liable at law, but there may be remedy had againſt him in equity. 2 *Mod.* 293. The executor of an executor, who commits a *Devaſtavit*, liable in equity. 1 *Chan. Ca.* 303.

15. If *A.* deviſes legacies, and makes *B.* and *C.* executors, and *B.* makes *C.* and *D.* his executors and dies, and they poſſeſs themſelves of the eſtate of *A.* they may be both charged in equity; for though in point of law, the executorſhip ſurvived to *C.* and *D.* is not privy, yet the eſtate of *A.* in whoſe hands ſoever, ought to be liable. *Trin.* 15 *Ca.* 2. *Nicholſon* and *Sherman.* 1 *Chan. Ca.* 57. reſolved upon demurrer. *vide* 2 *Vern.* 75. that a creditor may follow the teſtator's eſtate into whoſe hands ſoever it comes, notwithſtanding any aſſignment of it by the executor. 2 Freem. 181. S. C.

16. If *A.* makes *B.* executor, and after debts and legacies paid, deviſes *reſiduum bonorum* to *C.* if *B.* put not in all the goods into his inventory, or under-values thoſe he puts in; *C.* before the debts are paid, may ſue *B.* in equity, to enforce him to ſhew the very value of the goods. *Paſch.* 1 *Car.* 1. *Palm.* 402. *per Dodd* and *Crew.*

17. A

17. A bill may be exhibited in equity to diſcover aſſets, 2 *Chan. Rep.* 37. againſt an executor, and he thereupon decreed to pay debts and legacies, 2 *Chan. Ca.* 200. muſt charge that goods came to his hands, 1 *Chan. Ca.* 226. but not till he is ſued at law. *Hard.* 115. *Q.*

18. *A.* was bound to *B.* in a bond of 100*l.* and *B.* made his will, and *C.* executor thereof; and after declared his farther will, that *A.* ſhould have the bond, and died; *C.* proved the will, but omitted this codicil; and to compel him to prove it, *A.* ſued *C.* before the, *&c.* pending which the bond was ſued at law; *A.* having filed his bill for relief, it was reſolved that there ſhould be no relief for the legacy before the codicil proved, and that then he ſhould be relieved againſt the bond by the reaſon of the legacy; but the court ſupported the injunction till, *&c. Paſch.* 1657. *Took* and *Fitz-John, Hard.* 96.

19. A bill was exhibited, ſuggeſting that the defendant had ſet up a will pretended to be made by one, who died in the great ſickneſs in *London;* and that the defendant pretending to be executor of it endeavoured, being inſolvent, to get in the debts due to the teſtator; whereas the will was unduly obtained, and now litigated in the ſpiritual court; and the court on motion ordered, that the debtors to the deceaſed's eſtate ſhould forbear to pay any money, till the matter ſettled in the ſpiritual court; although it was urged, that the objection of inſolvency might be made to every executor. *Paſch.* 18 *Car.* 2. *Smallpiece* and *Anguiſh,* 1 *Chan. Ca.* 75.

20. Equity will oblige an executor to pay arrears of rent, tho' the perſon of the teſtator was not liable at law. 1 *Chan. Ca.* 121.

21. The defendant's teſtator gave the plaintiff 1000*l.* to be paid at the age of twenty-one years; the bill ſuggeſted, that the defendant waſted his eſtate, and therefore the plaintiff prayed he might have his ſecurity to pay his legacy when due; which was decreed accordingly by the maſter of the rolls. *Hil.* 20 & 21 *Car.* 2. 1 *Chan. Ca.* 121.

22. So where the teſtator deviſed a legacy to his child an infant, payable at the age of twenty-three, and made his wife executrix and reſiduary legatee, and ſhe married a ſecond huſband and died; and he took out adminiſtration *de bonis non,* with the will annexed (his wife being reſiduary legatee); and upon a ſuggeſtion of inſolvency, the court decreed him to give ſecurity to pay the legacy when it ſhould become payable. *Mich.* 1691. *Rous* and *Noble,* 2 *Vern.* 249.

23. If an executor or adminiſtrator receives in money, which was ſecured to the teſtator, and he lends it out again, and receives intereſt for it, yet he ſhall not be accountable for the intereſt; for he lends it out at his own peril; and there is no difference when the debtor voluntarily pays in the debt, and when he is compelled to it: decreed *Hil.* 31 *Car.* 2. *Groſvenor* and *Cartright,* 2 *Chan. Ca.* 21. 2 *Vern.* 197. S. C. cited, and ſaid to have been adjudged otherwiſe by lord chancellor, but reverſed in the houſe of lords. 2 *Chan. Ca.* 35. S. P. decreed. *Vide* 1 *Vern.* 197. *cont.* and there held by lord chancellor to be reaſonable, that executors in all caſes ſhould anſwer intereſt, if they had uſed the money in trade,

trade, or received any interest for it; and that the objection of the executors being answerable for the money, if it should miscarry or be lost, was of little force now, because a man may insure his money for *one per Cent.* and therefore decreed the executor liable, unless he made oath that he kept the money by him. 2 *Chan. Ca.* 152. S. C. that an executor or trustee, tho' not impowered or directed to place out money at interest, yet if he makes interest, he shall be accountable for it: Decreed 2 *Vern.* 548.

24. In this case a difference was taken by my lord chancellor; that if an executor or trustee of money places it out in the funds, or on other security, whereby he gains considerably, that he shall have the whole benefit thereof to himself, in respect of the hazard he run of being a considerable loser thereby, which he must have borne: But if such executor or trustee were an insolvent person at the time of placing out such trust money, there the *Cestui que Trust* shall have the whole benefit gained thereby, as he would have borne the loss thereof, if any happened; the trustee or executor, by reason of his insolvency, being incapable thereof, and consequently running no hazard at all. *Mich.* 1718. *Bromfield* and *Witherley*. *Pr. in Chan.* 505. S. C. *in totidem verbis: Eq. Ab.* 398. *C.* 8.

* 25. *A* made his will, and gave several legacies, and made *B.* his kinsman executor and residuary legatee; great part of his Estate consisted in *East-India Stock*, and he by his will directed his executor to turn his estate into money, as soon as conveniently might be; *East-India Stock* bore then a good price, and several of the legatees called for their legacies; and the executor taking the estate to be sufficient to pay all, gave them bonds for their legacies, but kept the stock so long, till it fell so low, that he had not assets to pay the legacies; and the executor brought his bill to have those, to whom he had given bonds for their legacies, abate; and that those that were unpaid might take their legacies in proportion, at the rate the stock was then at; but my lord keeper would not give him any relief against those that had bonds; and as to the others, he was to answer for the stock at the value it was of at the end of the year after the testator's death. *Hil.* 1702. *Keylinge*'s case.

26. An executor lost a bond due to the testater, which was urged, in behalf of a bond-creditor, he should stand charged with, and make good the debt to the testator's estate; and for the executor it being insisted, that a bond is not assets at law, but a creditor must expect, until the money due upon it be recovered; nor is the loss of a bond a *Devastavit* at law, and it would be hard to make the executor answer it out of his own state, in case the obligor was insolvent (as in this case he was) especially in equity; and the rather for that the losing of the bond did not lose the debt, but might be recovered in equity; and the executor had already brought a bill against the obligor for that purpose; and the court inclined to charge the defendant with the debt, but for the present only directed, that the executor should prosecute the suit brought by him against the obligor, with effect, in order to recover the money due on the bond that was lost, and respited the judgment obtained by the bond-creditor in the mean time. 2 *Vern.* 299.

27. If

27. If an adminiſtrator brings trover for goods, and recovers, and takes part in hand, and accepts a covenant for ſatisfaction of the reſidue, and the debtor afterwards fails, this is a *Devaſtavit* in the executor. *Norden* and *Levet*, cited by my lord chancellor, to be adjudged in *B. R.* and affirmed on a writ of error in the houſe of lords. 1 *Vern.* 474.

28. An heir at law being ſued paid a bond-debt of his anceſtor's, in which he was bound, and afterwards brought his bill againſt the executor, to be reimburſed out of the perſonal aſſets; the executor delivered up a bond of the teſtator's, and took another bond from the obligor, in which *J. S.* was bound as ſurety with him; though it was admitted, that at law this did charge the executor as a converſion and receipt of ſo much of the teſtator's eſtate; yet as the ſecurity was intended to be bettered by it, and as the heir at law was plaintiff, the court decreed, that the executor ſhould not be chargeable, but that he ſhould aſſign a ſecurity to the heir. 1 *Chan. Ca.* 74.

29. *A.* purchaſed a leaſehold eſtate of an executor, who had waſted a great part of the aſſets, having notice that there was a bond-creditor of the teſtator's, whoſe debt was 100 *l.* unſatisfied, and out of the purchaſe-money he had an allowance of a debt of 200 *l.* due to him from the teſtator, and a debt of 550 *l.* due to him from the executor himſelf; the remainder being 150 *l.* he paid the executor; on a bill brought by a bond-creditor, to have ſatisfaction for his debts out of the leaſehold eſtate, being part of the teſtator's aſſets; though for the defendant it was inſiſted, that an executor may ſell, and with the money, when he has it, pay his own debts: And for the ſame reaſon he may, upon ſale, diſcount and allow the purchaſer the debt he owes him; and the rather in this caſe, becauſe he paid 150 *l.* in money, with which the executor might have paid the plaintiff's debt; yet it was decreed by the maſter of the rolls, and confirmed by my lord chancellor for the plaintiff; ſaying that the defendant was a party, and conſenting to, and contriving a *Devaſtavit*. *Mich.* 1708. *Crane* and *Drake*, 2 *Vern.* 616.

30. After a ſuit commenced in equity, an executor ſhall not be allowed any voluntary payments. *Hil.* 1685. *Bright and Woodward*, 1 *Vern.* 369. *per Curiam.* 2 *Chan. Ca.* 201. S. P. *per Curiam.*

An Executor in Caſe of legal Aſſets may give Judgment to one Creditor in Preference to another. *Vide* the Caſe of *Darnſton* and *Earl of Oxford* *Eq. Ca. Abr.* Part 2.

31. So where an executor confeſſed a judgment, pending a bill in equity, and the court held that it ſhould not be allowed upon an account of aſſets. *Paſch.* 1687. *Surrey* and *Smalley*. 1 *Vern.* 457. 2 *Vern.* 62. S. P. *per Curiam*; but if he is ſued at law by one bond-creditor, pending a ſuit againſt him in equity by another, he may confeſs judgment to the bond-creditor, who ſues him at law. 2 *Vern.* 299, 300. Qu. the difference in the caſes 1 *Vern.* 457. and 2 *Vern.* 299, 300. which occaſions the oppoſition of the decrees?

(B) What

(B) *What shall be* (a) *Assets.*

(a) *Vide* title *Heir*, and *Creditors and Debtors.*

1. A. Purchased lands in his own name, and took an assignment of a mortgage term for years in the name of two trustees and died, leaving his wife executrix; and the plaintiff, his heir at law, brought a bill to have the term assigned to him, for that it was to attend the inheritance; which was decreed accordingly; although it was insisted upon, in behalf of the executrix, that it was a term in gross; and that there being no mention in the assignment that it should attend the inheritance, it should be assets, and enjoyed as a chattle. *Hil.* 1680. *Tiffin* and *Tiffin*, 1 *Vern.* 1, 2. but Q. *if there was any want of assets.* 2 *Ch. Rep.* 49 55 *S. C.*

2. For where a man took an assignment of a term in a trustee's name, and the inheritance in his own name, it was held, that though by construction in equity the term is attendant upon the inheritance; yet it shall be assets for payment of debts, as well as a term in a man's own name is assets at law; but with this difference, that the heir shall have the benefit of the surplus of trust of a term, and not the executor, after debts paid; but if a term be expresly declared by deed to be attendant on the inheritance, then such a term shall not be made assets in equity; but the reporter says, this point was not directly in the case, but came in by way of argument only. *Mich* 1683. *Chapman* and *Bond.* 1 *Vern.* 188, 189. *Vide* 1 *Vern.* 104. that such a term shall be assets to pay debts, though not subject to the custom of *London.* 2 *Chan. Ca.* 152. S. P. *per Curiam*, and a note added by the reporter, that it was contrary to former resolutions.

3. But where *A.* seised in fee, in consideration of a marriage-portion, demised certain lands for ninety-nine years to *B.* and *C.* under the rent of a pepper-corn upon trust that they should redemise them in the following manner, *viz.* to *A.* for ninety-nine *Years* and eleven *Months*, if he should live so long, reserving the rent of a pepper-corn only during the life of *A.* and after his decease a rent of 150*l. per Ann.* during the life of his wife, as a jointure for her; and after her death a pepper-corn for the residue of the term; *B.* and *C.* redemised accordingly; *A.* died indebted 9000*l.* by bond-debts, and 18000*l.* by simple contract, and left not above 6000*l.* personal estate. On a bill brought by the creditors, to have this term made assets, it was held by three judges, the master of the rolls, and my lord chancellor, that this term being raised for a particular purpose, could not be liable to any other debts than the inheritance was; and decreed accordingly. *Pasch.* 1688. *Baden & al'* and *The Countess Dowager of Pembroke*, 2 *Vern.* 52, 53.

Vid. S. C. afterwards before the lords commissioners, 2 *Vern.* 213 *Vid.* 1 Will. *Rep* 283

4. By the statute of frauds and perjuries, the trust of an inheritance is made (*b*) assets at law, but the trust of a term is not; and by the clause in the statute, when judgment is obtained against the testator, the sheriff may take the trust-estate into execution. 2 *Vern.* 248

(*b*) what shall be legal, what equitable assets, *vide* the order in which debts shall be paid, title *creditor and debtor*, letter (*B*)

5. If *A.* purchaſes a walk in a *Chaſe*, and takes the patent to himſelf and his wife, and *J. S.* during their lives and the life of the ſurvivor, and the huſband dies indebted, yet the wife ſhall have the benefit of the patent during her life, though *A.* had not left aſſets to pay his debts; but after her death, *J. S.* muſt be a truſtee for the executor: decreed. 2 *Vern.* 67.

6. *J. S.* on the ſale of lands takes a bond from the purchaſer, to pay any ſum or ſums of money not exceeding 500*l.* as he ſhould by will appoint; and *J. S.* by will diſtributes it, and appoints payment of it to ſeveral of his relations; the bill was brought by the creditors of *J. S.* for ſatisfaction out of aſſets; and (*inter alia*) to have the 500*l.* applied towards payment of their debts; and the court held, that *J. S.* having power to diſpoſe of the 500*l.* it muſt be looked upon as part of his eſtate; and decreed it to be aſſets liable to the plaintiffs debts. *Trin.* 1694 *Thompſon* and *Towne*, 2 *Vern.* 319.

7. So where *A.* by marriage-ſettlement having power to charge an eſtate with any ſum not exceeding 3000*l.* for ſuch purpoſes as he thought fit, by deed appointed the 3000*l.* as a colateral ſecurity, for quiet enjoyment of an eſtate he had ſold; and if no incumbrance did appear, the appointment was to be void and by will deviſed the 3000*l.* to his daughter; and upon a bill brought by the creditors of *A.* the 3000*l.* was decreed to be applied to the payment of his debts. 2 *Vern.* 465. *Laſſells & al'.* verſus *Dominum Cornwallis*.

Dux Devon. ver. *Kington S. C.* before King C. in 2 *Will. Rep.* 381.

8. If *A.* ſeiſed of a leaſehold eſtate to him and his heirs for three lives, ſettled it on his daughter and her huſband for their lives, remainder to the uſe of his own executors and adminiſtrators; and the daughter and her huſband die, and *A.* dies indebted by ſimple contract, having deviſed his eſtate to his wife; the uſe of this eſtate being limited to the executors and adminiſtrators of *A.* makes it perſonal eſtate in *A.* and being perſonal eſtate, *A.* cannot deviſe it exempt from his debts, though due but by ſimple contract: decreed. 1 *Vern.* 719. *Vide* 1 *Vern.* 234.

(C) *Where upon the Death of one of the Executors, the ſurplus of the perſonal Eſtate, after Debts and Legacies paid, ſhall ſurvive to the other.*

1. IF a man makes *B.* and *C.* executors, and deviſeth to them *reſiduum bonorum, &c.* after debts and legacies paid; and after *B.* dies, the ſurpluſage ſhall (*a*) not ſurvive, for it ſhall be ſuppoſed the teſtator intended an equal ſhare to his executors; and decreed for the adminiſtrator of *B.* accordingly, but much to the diſſatisfaction of the bar; for where the intention is ſecret, and not declared, it muſt give way to the legal intent. *Mich.* 26 *Car. Cox* and, *Quantock*, 1 *Chan. Ca.* 238.

(*a*) Q. For the reſolutions ſince have been otherwiſe in equity; and it ſeems well ſettled, that the ſurvivor ſhall have the whole by law; as where a man deviſeth goods to *A.* and *B.* and the executor aſſent to the legacy; and *A.* died, and his executor ſued in the ſpiritual court for *A.*'s ſhare there being no ſurvivorſhip in ſuch caſe, by the eccleſiaſtical law, whereupon *B.* ſued a prohibition, and declared; and upon demurrer and argument it was adjudged the prohibition ſhould ſtand; for by the aſſent of the executor, the intereſt was inveſted in the legatees, and became a chattle in them, governable by the rules of the common law. *Mich.* 29 *Car. Baſtard* and *Stukely*, 2 *Lev.* 209. *Vide* 1 *Lev.* 264. 2 *Jon.* 161, 130.

2. A man having devised the surplus of his estate, after his debts paid, to *A.* and *B. A.* died; and it was adjudged in the delegates, and decreed by the lord *North*, and confirmed by *Jefferies* lord chancellor, that this was a joint devise, and should survive to *B.* the lord chancellor's opinion was, that if *A.* and *B.* had been made (*a*) executors, and *A.* had possessed a moiety of the goods, and died it would have been all one. *Mich.* 1687. lady *Shore* and *Billingsley*, 1 *Vern.* 482.

(*a*) That it should survive to the executor, *vide* 2 *Chan. Ca.* 64. *Draper's* case resolved; S. P. resolved, *Cox* and *Quantock*, 1 *Chan. Ca.* 238. Q. if not the contrary. *Vid.* ante *Cas.* 1.

3. So where a man devised all the rest and residue of his goods, chattles and personal estate, to two persons, their executors and administrators, and one of them died; and it was, on a bill brought by his executor against the survivng devisee, held, that the survivor should take the whole to his own use, and should not be a trustee, as to a moiety, for the representatives of him who is dead; and that they were to be considered as joint-tenants, where survivorship takes place, as well in cases of chattels, as in cases of inheritance. *Trin.* 1729, *Cray* and *Willis* at the rolls.

2 *Will. Rep.* 529. S. C. *Vide Webster* and *Webster* S. P. *Eq. Ca. Abr.* Part 2. and 2. *Will Rep.* 347. S. C.

* 4. *A.* made his will, and after several legacies, gave and devised all the rest and residue and remainder of his personal estate to three persons, whom he made his executors; one of them died in the life-time of the testator; and the only question was, whether the two surviving executors should have the whole or whether the third part should be distributed according to the statute amongst the next of kin; and the master of the rolls on time taken to consider of the case, and citing most of the authorities, both out of the civil and common law, was of opinion, and decreed accordingly, that the two surviving executors should take the whole. *Trin.* 1730. *Hunt* and *Berkley* at the rolls.

Hardwicke C. *East.* 12 *Geo.* 2. in the case of *Owen* and *Owen* said, on consideration of this case he did not think the reasons the master of the rolls went upon sufficient to warrant this determination; for the next of kin take not by the intent of the party who makes the will, but by a legal right arising on the trust and intestacy. *MS. Notes. Vid.* 1 *Will. Rep.* 700. 2 *Equ. Abr.* 440. *pl.* 38. a case in every respect similar to this, but that the devise to the legatees was in common and not joint, as here: as it was in common, lord Parker decreed the part of the deceased legatee to be distributed among the next of kin (and also as the executor appointed was only in trust) but it is there clearly implyed that if it had been a joint bequest, the decree would be the same as this of the master of the rolls. *i. e.* that it should survive. *Mem.* the devise there is to the executors, but that makes no difference. *Vid Salk.* 238

(D) *When the surplus of the personal estate belongs to the executor, or he is to be a trustee for the next of kin to the testator.*

Vide for this head 2 Bac. Abr. 423 456. 2. *Abr. Eq.* 433.

1. A. By will devised particular legacies to his children and grandchildren, and 10*l.* a-piece to *A.* and *B.* whom he made executors, for their care; the surplus of the personal estate being 5000*l.* and upwards; the question was, whether the surplus should be a trust for the children, or go to the executors; and it was decreed (*b*) a trust for the children. *Mich.* 1687. *Foster* and *Munt*, 1 *Vern.* 473. *per Jeffries* lord chancellor. 2 *Vern.* 648. S. C. cited, and said to be affirmed in the house of lords.

S. C. (*b*) since this case, there hath been variety of resolutions, both in chancery and the house of lords on this head; notwithstanding which, this matter seems as undetermined as any in equity; for though the law casts the whole personal estate on the executor; yet as the intention of the testator is chiefly to be regarded in a will, if it appears by a strong and necessary implication, that the executor was not to have it to his own use, equity will decree him a trustee for the next of kin to the testator; and therefore it seems agreed, that if strangers, or distant relations are made executors, and legacies are given them for their care and trouble, that they shall not have the surplus; but where the executors are as nearly related, as those who claim as next of kin, and they have had all legacies given them, though perhaps some of them greater and some of them less, great doubt has been; in which instances it has (as appears by the cases) being determined

according to the intention of the teſtator, collected not only from the words of the will but likewiſe from collateral proof of teſtator's greater kindneſs, &c. which upon theſe occaſions has been admitted ſometimes for the executor, and ſometimes for the next a-kin.

2 *Freem. Rep.* 224. S. C. *accord.* The reporter ſays, it was admitted that if proof could have been made of a parol declaration of the teſtator's intent, that the executors ſhould have had the ove plus, it would have been ſufficient, as in lady *Gainſbury*'s caſe,—*Prec. in Chan.* 92. S. C. ſays, lord chancellor decreed the ſurplus to be diſtributed, and the executors to pay coſts for inſiſting on it. *Vide* the caſe of *Farrington* and *Knightly*—*Rachfield* and *Careleſs*—*Duke of Rutland* and *Dutcheſs of Rutland accord'*, and the caſe of the *Attorney general* and *contra*, all in *Eq. Ca. Abr.* part 2. 2 *Vern* 148 *S. C.* 2 *Ver.* 91. 164. *Brown's Rep.* 333. *S. C. Prec. Cha.* 12.

2. *A.* by will gave ſeveral legacies therein ſpecified to all her next of kin by name; and likewiſe gave particular legacies to *M.* and *P.* two diſſenting miniſters, and made them her executors, but did not make any expreſs diſpoſition of the ſurplus of the perſonal eſtate; and the executors were obliged to account and diſtribute the ſurplus among the next of kin to the teſtator. *Mich.* 1698. *Bayley* and *Powell*, 2 *vern.* 361. decreed. Mem. no reſolution in Vern as here ſaid.

2 *Freem. Rep.* 276. *S. C. accord'*,

3. So where *A.* made *B.* his executor, and gave him 20*l.* for mourning, and *B.* not being of kin to the teſtator, the ſurplus of the perſonal eſtate was decreed to be diſtributed. *Paſch.* 7 *Ann. Cook* and *Walker*, 2 *Vern.* 316. S. C. cited.

4. So where *A.* gave 100*l.* legacy and the intereſt of 300*l.* to his wife for her life, and made her and *B.* and *C.* executors, and gave to *B.* 20*l.* for mourning; and the ſurplus was decreed to be diſtributed. *Trin.* 7 *Ann. Durwell* and *Bennet*, 2 *Vern.* 677. cited.

5. *A.* made his will to the effect following, *I diſpoſe of my Eſtate after-mentioned, and what elſe I have in the world, in manner and form following*, and then gives ſeveral legacies to his relations, amounting to near the value of his eſtate (as appeared by a calculation of his own hand-writing by him about that time made) and made *B.* and *C.* executors, and gave them 20*l.* and intreated them to take the trouble of getting in his eſtate; the teſtator lived ten years after and acquired an additional eſtate, and died not having altered, nor new publiſhed his will; and on a bill brought by the next of kin againſt the ſurviving executor, it was decreed, that the ſurviving executor was but an executor in truſt, and that the new acquired eſtate ſhould go to the legatees in proportion to their legacies. *Trin.* 1690. *Cordell* and *Noden*, 2 *Vern.* 148. decreed by the lords commiſſioners, and *Rawlinſon* reſted much on the words, *I diſpoſe of my Eſtate after-mentioned, and what elſe I have in the World.* &c.

6. So where one made his will, and his wife executrix, and lived twenty years after the will, and acquired an eſtate; and the ſurplus was decreed to be diſtributed. 13 *W.* 3. *Ward* and *Lane*, 2 *Vern.* 677. cited to be judged.

* 7. *A.* deviſed lands to be ſold for payment of his debts, and wills, that the ſurplus ſhall be deemed part of his perſonal eſtate, and go to his executors, and gives to his executors 100*l.* a-piece as a legacy; and the queſtion was, whether the executors ſhould have the ſurplus to their own uſe, or ſhould diſtribute according to the ſtatute of diſtributions. For the executors it was inſiſted that the ſurplus ſhould be part of his perſonal eſtate, and go to them, and that he meant it them to their own uſe; and his giving them a legacy of 100*l.* a-piece, cannot alter the caſe, for the ſurplus perhaps might be nothing; and therefore he gave them the 100*l.* that they might at all events be ſure of ſomething, and not to exclude them of the benefit of the ſurplus; and this being a deviſe of

2 *Will Rep.* 594. *Cited Prec. Chanc.* 83. *S. C.* 2 *Vern.* 345. *all ſeem to be S. C.* tho' in the laſt it is 1709. and ſaid to be counteſs of Briſtol and Hungerford

he ſurplus after debts and legacies paid cannot be a truſt in them, or then all the truſt is performed, when debts and legacies are aid. On the other ſide it was ſaid, that the words in the will, hat the ſurplus ſhould be part of his perſonal eſtate (*and go to his Executors*) were only intended to exclude the heir, who elſe would ave had it, and not to give any greater intereſt to his executors han they would have had otherwiſe; and of the ſame opinion was ay lord chancellor; and decreed accordingly. *Hil.* 1697. *The lord Briſtol* and *Hungerford.*

8. But where a man deviſed his library of books to *A.* (except en books, ſuch as his wife ſhould chuſe, as plays, romances, Ser- nons, but not law-books) and made her executrix; and it was eld by lord Keeper, that ſhe ſhould not by this deviſe be ex- luded from the benefit of the ſurplus of the perſonal eſtate. *Trin.* 704. *Griffith* and *Rogers* decreed. *Prec. in Chan* 231. S. C.

9. So where one not of kin, but a ſtranger, was made executor, nd had conſiderable legacies given him; although it was decreed y Sir *Peter King*, in the mayor's court, in favour of the teſta- or's two brothers, that the ſurplus ſhould be diſtributed; yet pon appeal to the houſe of peers, that decree was reverſed; not barely as it ſtood upon the will, but that parol proof ought to be eceived in favour of the executor's title, conſiſtent with the will; nd the proof being full as to the teſtator's frequent declarations, hat his executor, though a ſtranger, ſhould have the ſurplus; it as decreed accordingly. *Littlebury* and *Buckley*; S. P. decreed on he parol proof, *the Lady Granvill* and *the Dutcheſs of Beauford*, (a) 2 *Vern.* 648. and affirmed in the houſe of lords. *vide* title *Evidence.* letter (C).

(a) 1 *W Rep.* 114. S. C. *Vide* the caſe of *Mallabar* and *Mallabar* S. P. *per Talbot* C. *Eq. Ca. Temp. Talbot* 78, 80. though *animo reluctante.*

10. *A.* poſſeſſed of a long term for years, by will deviſed it to is wife for life, and after her death to the child ſhe was then *enſeint* with; and if ſuch child died before it came to twenty-one, hen he deviſed one third part of the ſame term to his wife, her xecutors and adminiſtrators, and the other two thirds to other erſons, and made his wife executrix of his will, and died; and he bill was brought againſt her by the next of kin to the teſtator, o have an account and diſtribution of the ſurplus of his perſonal tate not deviſed by the will; and two queſtions were made; 1ſt, hether the deviſe to the wife of one third part of the term was ood, becauſe it happened ſhe was not then *enſeint* at all; and ſo e contingency, upon which the deviſe to her was to take place, ver happened; the other queſtion was, whether this term, being rt of the perſonal eſtate, and expreſly deviſed to her for life, ith ſuch other contingent intereſt on the death of the ſuppoſed *ſeint* child before twenty one, ſhould ſhut her out from the ſurplus the perſonal eſtate, which belonged to her as executrix, and ſo e ſurplus go in a courſe of adminiſtration, to be diſtributed ongſt the plaintiffs, as next of kin. As to the firſt point, lord eper delivered his opinion, that though the wife was not *enſeint* the time of the will, yet the deviſe to her of ſuch third part of e term was good; and as to the other point diſmiſs'd the plain- 's bill, and ſo let in the executrix to the ſurplus of the perſonal ate, notwithſtanding the deviſe to her of part, as aforeſaid. ch. 1711. *Jones* and *Weſtcomb.*

Prec. in Chan. 316. S. C. *Gilb. Eq. Rep.* 74. S. C.— *Vide* alſo *Andrews on the Demiſe of Jones* v. *Fulham, Eq. Ca. Abr.* Part 2. 2 *Str.* 1092. *Salk.* 415. *Ver.* 421. 3 *Atk.* 284. 317. *Frames C. Rem.* 400 406. *Dough.* 63. 75.

11. *A.* was executrix of *B.* her former huſband, and after married *C.* who, by his will in 1686, deviſed to his wife the plate and goods ſhe brought him in marriage, and two ſilver ſalvers, in lieu of plate that had been changed away, and made her executrix, and died, leaving a daughter by a former wife, and his wife *enſeint* of a daughter; and there being no deviſe of the ſurplus of the perſonal eſtate, the queſtion was, whether ſhe ſhould take it as executrix to her own uſe, or liable to diſtribution; and lord keeper decreed the ſurplus to the wife, as well for that this will was made before the caſe of *Foſter* and *Munt*, as alſo for that in this caſe nothing is deviſed to the wife, but what was her own before, and as ſhe was executrix to her former huſband; but principally, becauſe where a wife is made executrix, it is to be preſumed ſhe was not made ſo to have barely an office of trouble but of benefit, to take the ſurplus. *Hil.* 1711. *Ball* and *Smyth*, 2 *Vern.* 675.

Gilb. Rep. 125. S. C. *in totidem verbis.* 2 *Vern.* 736. S. C.

12. The plaintiff married one Mrs. *Allen*, ſiſter to *William Allen*, who being poſſeſſed of a perſonal eſtate to the value of about 2000 *l.* and being taken ill makes his will in writing the very day before his death, and thereby deviſes ſeveral legacies to his relations, and amongſt the reſt, gives the plaintiff his ſiſter about 1000 *l.* and gives 70 *l.* to Mr. *Serle* and his wife, and their four children, to buy them mourning; and gives to his dear and moſt eſteemed friend, Mrs. *Sarah Serle* (one of the daughters of Mr. *Serle*, to whom he had made his addreſſes in way of marriage) 500 *l.* and gives his horſe and furniture to one of the defendants, by his chriſtian name and ſurname, and his cloaths to be diſpoſed of by his executors; and then concludes, *as to the* 700 l. *I am intitled to in the* ſouth-ſea *company, and the reſt of my perſonal eſtate, I will that the ſame ſhould be ſold for payment of my debts and legacies, and I make Mr.* John *and Mr.* Thomas Serle *my executors*, and dies. The executors, were two of the children of Mr. *Serle*, and intitled to their proportion of the 70 *l.* deviſed for mourning, and one of them to the horſe and furniture; but were no ways related to the teſtator. The ſurplus of the perſonal eſtate came to about 600 *l.* and this bill was brought againſt the defendants the executors to have an account thereof; and that it might be paid to the plaintiff, whoſe wife was the only ſiſter and next of kin to the teſtator. And for the plaintiff's it was inſiſted, that the executors were meer ſtrangers, no ways related to the teſtator, and that they had particular legacies left them for mourning out of the 70 *l.* and one of them had a horſe and furniture expreſly deviſed to him; and therefore it was not reaſonable that they ſhould go away with the ſurplus of the perſonal eſtate. On the other ſide it was inſiſted that the defendants being executors, they repreſented the teſtator, that they ſtood in his place, and were intitled to whatever he left undiſpoſed of; that this was the ancient law for many ages, and therefore the legal title being in them, they ought not to be defeated of it, without a manifeſt intention of the teſtator to the contrary, that here appeared no ſuch intent in the will, for they are not named, either by the chriſtian name or ſurname, or ſo much as by the name of their office, till the very cloſe of the will; nay it was in proof, that the teſtator did not ſo much as conſider who he ſhould make his executors, till he had diſpoſed of all the legacies; that the giving one of them his horſe and furniture, was only to exclude the other, who, by being executor with him, would

have been equally intitled to it, and could not be construed a legacy to shut them out of the surplus, since it rather regarded the other executor than the plaintiff, the next of kin; that they had it fully in proof that the testator being asked, whether he would not give his sister more? answered he would not; that being asked, who should have the surplus, or what should become of the surplus? he said his will should stand as it was, and that he had a very great regard for the defendant's family, and was to have married their sister; that these proofs being in affirmance of the disposition which the law made to the executors might be read; and that several resolutions, since the case of *Foster* and *Munt*, had pared away the authority of that case, and therefore prayed that the bill may be dismissed. My lord chancellor was clearly of opinion, that the proofs being in affirmance of the disposition, ought to be read, and said, that they were so full as to make an end of this case; that without a strong and violent implication, the executors ought not to be defeated of the *residuum*; that here was no such implication in this will, but rather the contrary; that to make sense of the last clause, it must be construed as a devise of the *south-sea* stock, and the rest of his personal estate, to his executors; for it immediately follows, and I make *John* and *Thomas Serle* my executors, which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent implication to induce any other construction, he could not give into so great a change of the law, but must decree for the executors; and accordingly did so. *Hil.* 1716. *Batchelor* and *Serle*.

(E) *Of Remedies by one Executor against another, and how far the one shall be answerable for the other.*

1. IF two executors make partition of the specialties, *&c.* of the testator, and after one of them releases an obligation, which by the partition belonged to the other; though the debtor had notice of the partition, yet the other executor shall not be relieved in equity, unless the release was procured by fraud, or without a full satisfaction; the debtor must then satisfy the overplus. *Moor* 620. but *vide Hard.* 168. and *Q.* whether he has not remedy against the executor.

2. *A.* made *B.* and *C.* men of good credit, his executors; *C.* being a banker received all the money, but *B.* joined with him in the receipts, taking his note, to shew that he received not the money; and *per Harcourt* lord chancellor, if two trustees join in a receipt, and one receives the money, he only who receives shall be liable: If there be two executors, and they join in a receipt, and one only receives the money; as to creditors, who are to have the utmost benefit of the law, each is liable for the whole, though one executor alone might give a discharge, and the joining of the other was unnecessary; but as to legatees and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other; for the joining in the receipt is only matter of form, the substantial part is the actual receiving; and this only is regarded in conscience. *Mich.* 12 *Ann. Churchill* and *Hobson*, 1 *Salk.* 318. 1 *Will. Rep.* 241. S. C. *accord.*

3. But where one made two executors, and devised all his estate to his wife for life, and after to be equally divided amongst the plaintiffs, who brought their bill against the executors for an ac-

count; and the defendants, by anſwer, charge themſelves jointly and diſcharge themſelves jointly; and *inter alia* charge themſelves with two notes for 200 *l. Eaſt-India* ſtock, and afterwards, pending the ſuit, ſold the ſaid *Eaſt-India* ſtock, and joined in the transfer of it; but whether any acquittance were given for the purchaſe money did not appear: *Cox*, one of the executors, becomes inſolvent; and if *Pitt*, the other, ſhould be charged with the whole purchaſe-money, or only a moiety, was the queſtion. *Pitt*, on examination after the hearing, having ſworn he was perſuadeed by *Cox* to join in the ſale, but received only a moiety of the money; and it was decreed by the maſter of the rolls, and affirmed by my lord keeper, that he ſhould be charged with the whole, notwithſtanding the caſes of *Heaton* and *Marriot*, and *Fellows* and *Owen*; for they were truſtees of a real eſtate, where there was a neceſſity for both to join; but theſe were executors, where no ſuch neceſſity was; for one executor might have ſold without the other; beſides, this was done *pendente lite*, and no application made to this court; and there is nothing to diſcharge *Pitt*, but his own examination. *Hil.* 1708. *Murrel* and *Cox* and *Pitt*, 2. *Vern.* 570. S. C.

(E) *Of Adminiſtration, to whom to be granted, who are intitled to a diſtribution, and in what proportion; and here of bringing into hotchpot.*

1. IF an inteſtate dies before the year 1670. yet adminiſtration being granted after making of the *(a)* ſtatute, his perſonal eſtate is liable to a diſtribution. *Mich.* 1709 *Brice* and *Whiteing*, 2 *Vern.* 642.

(a) By the 22 & 23 *Car.* 2. *cap.* 10. All ordinaries and eccleſiaſtical judges, upon granting adminiſtration, muſt take bond of the adminiſtrator, with two or more ſureties, with condition, that the adminiſtrator ſhall make a true and perfect inventory of all the goods and chattels of the deceaſed, and exhibit it into the regiſtry of the ordinary's court by ſuch a day, and to adminiſter according to law, and to make a true and juſt account thereof, and to make diſtribution as followeth, *viz.* one third to the wife of the inteſtate, the reſidue amongſt his children, and ſuch as legally repreſent them, if any are dead other than ſuch children who ſhall have any eſtate by ſettlement of the inteſtate in his lifetime, equal to the other ſhares; but thoſe children who have been advanced by ſettlements or portions by the inteſtate, not equal to the other ſhares, ſhall have ſo much of the ſurplus as will make all equal; and the heir at law ſhall have an equal ſhare in the diſtribution with the other children, without any conſideration of what he had by deſcent or otherwiſe, from the inteſtate. If there are no children, nor legal repreſentatives of them, in ſuch caſe, one moiety ſhall be allotted to the wife, the reſidue equally to the next of kin of the inteſtate, in an equal degree, and thoſe who legally repreſent them: there ſhall be no repreſentation amongſt collaterals, after brothers and ſiſters children; and if there is no wife, then all ſhall be diſtributed amongſt the children; and if no child, then to the next of kin to the inteſtate, in an equal degree, and their repreſentatives; no diſtribution ſhall be made till a year after the inteſtate's death; and every one to whom any ſhare ſhall be alloted, ſhall give bond, with ſureties in the ſpiritual court, that if debts ſhould afterwards appear, to refund his ratable part thereof and of the charges of the adminiſtration. By the 29 *Car.* 2. *cap.* 3. the above act ſhall not extend to the eſtates of feme coverts that die inteſtate, but that their huſbands ſhall have adminiſtration of their perſonal eſtates, as before the making of the act; and the huſbands are not compellable to make diſtribution of their perſonal eſtates. By the 1. *Jac.* 2. *cap.* 17. no adminiſtrator ſhall be cited to render an account of the perſonal eſtate of the inteſtate, otherwiſe than by inventory, unleſs it be at the inſtance of ſome perſon, in behalf of a minor, or of one having a demand out of ſuch perſonal eſtate, as creditor, or next of kin. If after the death of the father, any of his children ſhall die inteſtate, without wife or children, in the life of the mother, every brother and ſiſter, and the repreſentatives of them, ſhall have an equal ſhare with the mother; ſuch part of any inteſtate's eſtate within the city of *London* or province of *York*, as any adminiſtrator hath by virtue only of being adminiſtrator, ſhall be ſubject to diſtribution, as in other caſes; and the cuſtom obſerved therein ſhall not be ſubject to extend to it.

2. If adminiſtration is granted to two, and one dies, yet the adminiſtration does not ceaſe, for it is not like a letter of attorney to o, where by the death of one, the authority ceaſes; but is rather office; and adminiſtrators are enabled to bring actions in their n names, come in the place of executors, and therefore the ſurvives. *Mich.* 1705. *Adams* and *Buckland*, 2 *Vern.* 514 lord keeper.

Vide the caſe of *Hudſon* and *Hudſon* S. P. by *Talbot* C. on hearing Civilians, *Eq. Ca. Abr.* Pt. 2.

3. If a man makes his will, and his ſon executor, but makes diſpoſition of the ſurplus of the perſonal eſtate; the ſon dies thout proving of the will; the teſtator is dead inteſtate as to e ſurplus, and the ſame ſhall be diſtributed amongſt the next of of the teſtator. 2 *Vern.* 634.

Vide 2 *Mod.* 101.

4. On the ſtatute for the better ſettling of inteſtates eſtates; the eſtion was on that clauſe of the ſtatute, that there ſhould be no preſentations among collaterals beyond brothers and ſiſters chilen, whether to be intended of brothers and ſiſters to the inteſtate; whether, when diſtribution falls out amongſt brothers and ſiſters, ough remote relations to the inteſtate, repreſentation ſhall be mitted; and the court held, that the repreſentation ſhould be ly between the brothers and ſiſters to the inteſtate. *Trin.* 1691. *law* and *Harding*, 2 *Vern.* 233. S. P. reſolved on a motion for a ohibition in *B. R. Pett*'s caſe, *(a)* 1 *Salk.* 250 *Vide* 2 *Vern.* 168. P. but no reſolution. *(b) Hales Hiſt. Com. Law.* 220.

(a) 1 *Will. Rep.* 25. S. C. ——*(b) Vide* the caſe of *Bowers* and *Littlewood*, 1 *Will. Rep.* 594. where lord *Parker* declares the law to be ſettled by Pett's caſe *Prec. in Chan.* 527. S. C. and P.

5. If one dies inteſtate, leaving a grandmother, and uncles and nts, the *(c)* grandmother is intitled to the perſonal eſtate, in cluſion of the uncles and aunts. *Trin.* 1719. *Woodroof* and *inkworth*, held clearly *per Curiam.*

(c) 1 *Salk.* 251. 2 *Ver.* 215. S. P. reſolved. caſes *B. R.* 615. *Holt.* 43.

6. If there be grandfather, father and ſon, and the father dies teſtate, the ſon ſhall have the adminiſtration, and not the grandther. *Vide* 2 *Vern.* 125.

7. *A.* had three brothers, one died, leaving three children, anther two, and the third five; then *A.* died inteſtate; and it was ſolved, that diſtribution ſhould be *per Capita*, and not *per Stirpes*, d that all the children ſhould have equal, becauſe none take by ay of repreſentation, but all as next of kin in equal degree. *Mich.* 1695. *Walſh* and *Walſh*, reſolved *in Canc'*.

Pr. in Chan. 54. S. C. *in totidem verbis.*

8. A man died inteſtate, leaving a brother of the whole blood, nd ſiſter of the half blood; and it was held that the ſiſter of the alf blood ſhould come in for an equal ſhare with the brother of he whole blood. *Smith* and *Tracy*, 1 *Mod.* 209. 1 *Vent.* 316. 1 *Lev.* 173. 1 *Vern.* 437. 2 *Vern.* 124. S. P. *Crooke* and *Watt*, *d).* Reſolved, and affirmed in the houſe of lords on great debate. *Show. P. C.* 108. 2 *Vent.* 317. S. C.

(d) 2 *Freem.* 112. S. C. ſays, the court were of opinion, according to the late reſolutions, that the half blood was in *æquali gradu*, and ought to have a whole ſhare.

9. The plaintiff's father, on the marriage of the daughter of *B.* ovenanted, in caſe of a ſecond marriage, to pay the firſt ſon by he firſt wife 500 *l.* there was a ſon and ſeveral other children of he firſt marriage; the father died inteſtate; and it was held, that he heir muſt bring the 500 *l.* into hotchpot, although in nature f purchaſer under a marriage-ſettlement. *Hil.* 1708. *Phiney* and *Phiney*, 2 *Vern.* 638, 639.

Q. how reconcileable with the clauſe in the act of diſtributions that the heir ſhall not be obliged to bring into hotchpot, other ſons, &c. the heir at law, though in the

hat he has received by deſcent or otherwiſe, from the inteſtate, though the all? unleſs that clauſe be intended only of lands, deſcended to, or ſettled on he clauſe thus apppears in the *Abr.* of the *Ir.* ſtatutes reſpecting only lands, br. of it, in the laſt page, it is generally of any thing deſcended, &c.

10. Mr. *Freeman* (late chancellor of *Ireland*) in the year 1693. his marriage, entered into articles, in conſideration of the ſaid

2 *Will. Rep.* 445. S. C.

marriage, and of 4000 *l.* portion, to ſettle ſuch an eſtate to the uſe of himſelf for life, remainder to his intended wife for life, remainder to the firſt and other ſons of the marriage ſucceſſively in tail male, remainder to truſtees for 1000 years, in truſt to raiſe portions for daughters, in caſe there were no ſons; that is to ſay, if but one ſuch daughter, the ſum of 5000 *l.* and if two, or more, then the ſum of 6000 *l.* equally between them, to be paid and payable at her and their reſpective age or ages of eighteen years, or days of marriage, which ſhould firſt happen; and 80 *l. per ann.* maintainance in the mean time, to each daughter, with remainder to his own right heirs, and gave a bond of 10000 *l.* penalty, for performance of covenants; the marriage takes effect, and they had iſſue one daughter only, and no ſon; then the wife dies, and afterwards Mr. *Freeman* married a ſecond wife; and on that marriage made a ſettlement of this eſtate amongſt others; but the ſecond wife, or her truſtees, had no notice of the articles made on the firſt marriage. Afterwards Mr. *Freeman* died inteſtate, leaving a ſon and a daughter by his ſecond wife, and left a perſonal eſtate to the amount of 20000 *l.* and upwards, at the time of his death, which was in 1710; the daughter by his firſt wife, at that time, was about twelve years of age, and ſome time ſince intermarrying with the plaintiff, they brought their bill to have an account of the perſonal eſtate of Mr. *Freeman*, and their diſtributory ſhare thereof; and the only queſtion was, whether this 5000 *l.* ſhould not be looked upon to be ſo far an advancement of the plaintiff, the wife, that if ſhe would have any farther ſhare of her father's perſonal eſtate, they muſt bring this 5000 *l.* into hotch-pot, upon the ſeveral clauſes and intent of the ſtatute 22 & 23 *Car* 2. for the diſtribution of inteſtates eſtates.

For the plaintiffs it was argued, that they were intitled to a diſtributory ſhare of the perſonal eſtate left by the father at the time of his death, without regard to this 5000 *l.* which was no advancement, either within the words or meaning of the act of parliament, which intended only an advancement of children after they come *in eſſe*, and when they were about being married or diſpoſed of in the world; but this, if any, was an advancement long before the plaintiff was born, and when it was wholly unknown and uncertain, whether there ever would be ſuch a daughter.

That it was likewiſe contingent and uncertain, after ſhe was born, whether ſhe would ever be intitled to this fortune, or not; for if ſhe had died before eighteen, or marriage, it would have ſunk into the inheritance, for the benefit of the heir at law; according to the caſe of *Pawlet* and *Pawlet*, 2 *Vent.* And ſhe was but twelve years of age at the time of her father's death, and therefore might have died before ſhe was intitled to this 5000 *l.*

That her diſtributive ſhare of her father's perſonal eſtate veſted in her immediately on her father's death, or not at all, and then it could not be deveſted out of her, by the accident of her attaining eighteen, or being married, whereby this 5000 *l.* became due.

That this 5000 *l.* was a debt upon the father's eſtate, which ſhe was intitled to as a creditor or purchaſer, in conſideration of her mother's marriage and portion; for which was cited the caſe of *Feaſt* and *Feaſt*, 3 *April* 1726. where, on a marriage-treaty, Sir *Felix Feaſt* covenanted to leave his wife 2000 *l.* at his death, 2000 *l.* to his eldeſt ſon, and 1000 *l.* a-piece to his younger children, and afterwards, being a freeman of *London*, died, leaving ſeveral

younger children; and it was held in that caſe, that the 1000 *l.* a-piece to the younger children being due only by covenant, was a debt on the perſonal eſtate; and not being to be paid till after the father's death, was no proviſion or advancement, either within the ſtatute of diſtributions, or the cuſtom of *London*, to bar them of their cuſtomary or diſtributary ſhares of their father's perſonal eſtate, which were greatly advanced at the time of his death.

To ſhew that this was not an advancement within the ſtatute, were conſidered the ſeveral clauſes of the act; and it was urged,

1*ſt*, That the ſtatute mentions only two caſes wherein there is to be any bringing into hotchpot: 1*ſt*, Where the child had been advanced by the father with any eſtate. 2*dly*, Where he had been advanced with any portion; as to the firſt, the plaintiff cannot be ſaid to have any eſtate by theſe articles, for the word *eſtate* in the ſtatute means lands in oppoſition to portion; and in the latter part of it, 'tis mentioned lands by ſettlement expreſly; but in the preſent caſe the plaintiff cannot be ſaid to have any proviſion of lands, the ſettlement of the lands being only in the nature of a mortgage, for her portion. 2*dly*, That this portion is not within the ſtatute, as an advancement by the inteſtate in his life-time, being neither payable nor demandable till after his death; and therefore in the caſe of *Rowland* and *Shepherd*, where the father agreed to give in marriage with his daughter the ſum of 7000 *l.* to be paid by inſtalments of 1000 *l.* a year, and the father had paid 6000*l.* of this portion, but died before the laſt 1000 *l.* became due; and on a bill brought for a diſtribution of his perſonal eſtate, it was decreed by Lord *Macclesfield*, and affirmed by your Lordſhip, that this 6000 *l.* paid, was not part of the advancement to be brought into hotchpot, but that the remaining 1000 *l.* was a debt to be paid out of the perſonal eſtate.

2*dly*, That the ſtatute muſt operate, either at the time of the father's death, or within a year after at furtheſt; but in this caſe the plaintiff was not entitled to her 5000 *l.* either in her father's life-time, or within a year after; and is the diſtribution to wait till it be ſeen, whether ſhe would attain eighteen, or be married?

Suppoſe there had been a ſon at the time of the father's death, who had after died without iſſue, would this portion have been an advancement in the mean time, ſo as to debar her of her diſtributory ſhare? for being contingent at firſt, ſuch value cannot be ſet on it in equity, as gameſters do on chances; and if part is to be laid up till the contingency happens, it is no advancement in the mean time; nor is there any inſtance, that one diſtributory ſhare ſhould be laid up to make a heap.

3*dly*, This 5000 *l.* was not a voluntary proviſion moving from the father, but the plaintiff was a purchaſer thereof, in conſideration of her mother's portion; and ſuppoſe a child had money of his own, and agreed with his father, in conſideration thereof, to have a portion from his father, after his death; or if a collateral relation had purchaſed ſuch a portion from the father for his child, certainly this would not be an advancement; and the intent of the ſtatute was to make them all equal out of the father's perſonal eſtate, not out of what was purchaſed for them by others, or by the mother, as in this caſe.

And

And it was likewise argued, that this was not a debt originally payable out of the personal estate, but that it was originally payable out of lands, notwithstanding the 10000 *l.* bond for performing of covenants; and though the defendants, who claim under the settlement made on their mother's marriage, shall not be affected as to the lands thereby settled, for want of notice; yet as to the lands not comprized therein, they shall be liable in the first place; and if they are not sufficient, the personal estate must be applied in aid to make it up, by reason of the bond.

Besides, no case can be produced where a portion settled by marriage-articles had been brought into hotchpot as an advancement by the father; and yet it must often have happened, that fathers who have made such settlements have died intestate, and is therefore of great consequence.

On the other side it was argued for the defendants, that in the first place no settlement being made pursuant to the articles, and the bond for performance thereof, the land will in no sort be subject thereto, but in aid of the personal estate, if that were deficient; and that too by the assistance of a court of equity on the agreement; for between the heir and executor, the personal estate shall be applied in the first place to discharge incumbrances, even on the real estate, and would have been so in this case, where it rested barely in covenant, and on the bond.

That the 5000 *l.* thus provided for by the settlement, was an advancement within the meaning of the statute, which appears throughout to intend and preserve an equality between the children; and if any *finesse* of reasoning were to be made use of in the construction thereof, it ought rather to be in support of that intent.

That the subject matter of the statute was chiefly personal estate, and yet there is no reason to exclude a provision by a real estate; and therefore where the statute says, other than such child who shall have an estate by settlement, why should not that be extended both to real and personal estate? it is true, the statute is not perfectly correct, according to the rules of grammar; and therefore, where portion is mentioned in the first part, it is omitted in the second; and what is called estate in the first part, is called land in the second.

That if these lands are in equity to be considered as a settlement of lands, then it is an advancement according to the act; if they are not to be considered as a settlement of lands, then it is an advancement by a portion; and as to the objection, that this was not a voluntary provision of the father, but arose from the contract of the parties: it was answered that the statute makes no such distinction, and therefore neither ought this court to make it; for the act only intended an equality between the children, whether the provision was voluntary, or by purchase; and a child provided for either one way or other, is provided for; and it is not like the cases put, where a child, either with his own or a relation's money, purchases an estate, or a sum of money from the father; for this certainly is no provision by the father, but a direct sale, as much as it would have been to any stranger; and in the case of *Newland* and *Shepherd*, the question was not, whether the 6000 *l.* paid,

id should not be brought into hotchpot, if she had desired to be t into a further share, but whether the 6000 *l.* being more than r share for the whole, she should, besides, have the other 1000*l.* d it was decreed that she should; besides, there is no pretence to y, that the custom of *London* is to govern an act of parliament.

That this portion, though not payable 'till after the father's eath, was, nevertheless, a provision for her by him, in his life-ne, as the act speaks; as the principal part of it, *viz.* the secu-ty, was executed by him in his lifetime; and as he was not at perty to controul it; and suppose he had given such a portion at s death, would not this be a good provision within the statute; d here the portion is payable as soon as possibly it can be wanted, z. at eighteen, or marriage, and a maintenance of 80 *l. per an-m* in the mean time; and though it is true, that a portion out of nds sinks in the inheritance, if the party dies before it becomes yable; which, if it were of a personal estate it would not; that not material, since the statute makes no distinction, whether the rtion is payable out of the real or personal estate.

That if a bill had been brought immediately after the father's eath for a distribution, there could be no inconvenience in set-ng a-part a sum to answer the contingency, when it should hap-n, no more than in the case of debts, which is every day done; d there are some whose estates are not got in till several years ter their deaths; and a distribution may very properly be made ereof from time to time, as they come in; neither is the distri-ution wholly to wait till they are got in; and in the cases of *Fin-y* and *Finney*, and *Lonoy* and *Hutchinson*, it was decreed, that e heir at law should bring into hotchpot whatever share he re-ived out of the personal estate, if he would have any more; and n the case of *Kelway* and *Kelway*, on the statute 21 *Jac.* 1. it was held, that where a man dies, leaving a wife, and no children, hat the wife being entitled to one moiety of his personal estate, he other moiety shall be distributed equally between his mother nd brothers and sisters; and yet the case of leaving a wife is not entioned in that statute. *Qu.* if not 1 *Jac.* 2. *Cap.* 17.

The court were all clear of opinion, that this was an advance-ent by the father in his life-time within the meaning of the atute, though contingent and future, so that she could not have at and her distributory share likewise; and the master of the rolls id, that the civil law made no difference between a real and rsonal estate, but only moveable and immoveable; and the words the act, which speak of a provision made by the father in his e-time, are very proper to distinguish between that and a pro-ion made by his will; and cited the writ *De rationabili parte orum*, and *Swinb.* 200. to prove that a future provision will ex-de the heir or any other of the children; and cited *Pawlett* and wlett, 2 *Vent.* 1 *Vern.* 321. and the chief justice said, suppose father had left but 2000 *l.* personal estate, it would be ex-mly hard, that the eldest daughter should have her 5000 *l.* and are of the 2000 *l.* too.

And *per* lord chancellor, the case of *Feast* and *Feast* is not to cited in this case, that being a cause by consent, and the stion very little considered; and he said, he thought any settle-

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ment in or out of lands, either by annuity, rent or portion, would be a proviſion within the ſtatute; and that ſuch proviſion might be valued and brought into the *Collatio bonorum*, if they think it worth their while; that the 5000 l. whether called contingent, or not, is an intereſt, and ſuch a one as would happen within a reaſonable time, viz. ſix or ſeven years after the father's death, and there was then no ſon; and it was ſuch an intereſt as was valuable.

That the diſtribution muſt be made as the eſtate ſtands at the father's death, and the parties are to give bond to refund, if debts afterwards appear; and future debts due to the inteſtate muſt be diſtributed as they can be got in; that here the contingency has happened, and ſhe is now at liberty to ſay, whether ſhe will ſtick to that proviſion, or bring into the computation of *Collatio bonorum*, in order to have an equal ſhare with the reſt. But as to the 80 *l. per annum* maintenance, that is not to be brought in, being only for the education and maintenance of the daughter, which the parents were beſt judges of; and accordingly the decree was pronounced. *Mich.* 1727. *Edwards* and *Freeman*, *per* lord chancellor aſſiſted with *Raymond* chief juſtice, the maſter of the rolls, and *Price* and *Forteſcue* juſtices.

CAP. XXX.

Fines and Recoveries.

(A) *What Eſtate or Intereſt may be barred or transferred by Fine or Recovery.*

(B) *What Charges and Incumbrances on Lands are barred and deſtroyed by fine and recovery.*

(C) *What Charges and Incumbrances are made good by Fine and recovery.*

(D) *Where equity will ſupply a defect in a Fine or Recovery.*

(E) *Fines and Recoveries, in what caſes vacated or ſet aſide in equity.*

(A) *What Eſtate or Intereſt may be barred or transferred by Fine or Recovery.*

IF *Ceſtui qui Truſt* in tail levies a fine, or ſuffers a recovery, ſuch fine and recovery ſhall have the ſame operation, as if it were an eſtate at law, eſpecially if it be on a conſideration paid. *Paſch.* 16 *Car.* 2. *Goodrick* and *Brown* (*a*) 1 *Chan. Ca.* 49. 1 *Chan. Ca* 213. S. C. cited, and ſaid to be the firſt precedent of the kind. 1 *Chan. Ca.* 68. S. P. where it is ſaid to be *Bridgman*'s opinion that it ſhould not bar; but it is now well ſettled; for,

(*a*) 2 *Freem.* 180. S. C. decreed that a fine and recovery of *ceſtui que truſt* ſhould operate as ſtrongly as an eſtate at law, and to the ſame purpoſe, if it were on any conſideration; (ſays Judge *Windham* doubted) for otherwiſe he had ſaid this court would not give relief.

2. If *A.* conveys his eſtate to truſtees, in truſt that they ſhall convey to ſuch perſons and for ſuch eſtates, as he ſhall by will direct; and then by will directs, that the truſtees ſhall convey to *B.* his ſon in tail male, remainder to *C.* in tail male, remainder to the right heirs of the teſtator, and *B.* being in poſſeſſion, ſuffers a recovery without the truſtees; this ſhall bar the eſtate tail

tail in equity, for a truſt is a creature of chancery, and to be governed by the rules of equity, and not by the niceties of the law. *Mich.* 1688. ſir *Francis North and Way*, 1 *Vern.* 13. 2 *Chan. Ca.* 78. S. C. a truſt-eſtate in tail is not within the ſtatute *de donis*, and therefore may be barred by fine or recovery. 2 *Vent.* 350. 2 *Chan. Ca.* 71. S. P. 2 *Vern.* 132. S. P. 1 *Vern.* 440. S. P. decreed, *Waſhborn* and *Downes*, 1686. where it is ſaid, that it was not doubted ſince lord *Bridgman*'s time. but that a fine and recovery will bar as at law.

3. If *A.* be *Ceſtui que Truſt* for life, remainder in truſt for *B.* in tail, remainder in fee to *C. B.* cannot, by ſuffering a recovery, bar the remainder, if there be no good tenant to the *Præcipe*. 2 *Chan. Ca.* 64 lord *North* C. J. and *Champernoon*; *per* lord chancellor. 1 *Vern.* 13. S. C. but S. P. does not appear.

4. If *Ceſtui que Truſt* in tail with remainder over levies a fine, and dies without Iſſue, and five years paſs, and non-claim; *per* lord keeper, This ſhall bar the remainder; *Baſket* and *Peirce*, 1 *Vern.* 226. but if there be an entry or claim, *Quære* whether the remainder is barred? *Vide* 2 *Chan. Ca.* 64. *And* vide *how Truſt Eſtates are barred or conveyed, and what ſhall be a Breach of Truſt in the Truſtees*, title *Truſt*.

5. If the truſtee ſells the land to a ſtranger, that has no notice of the truſt, and a fine with proclamations and five years paſs; and afterwards the truſtee, for valuable conſideration really paid, purchaſes theſe lands again from the vendee; *per* lord chancellor and chief juſtice *North*, the truſtee ſhall ſtand ſeiſed as at firſt, as if there had not been any fine levied. *Mich.* 34 *Car.* 2. 1. *Vern.* 60. *Bovey* and *Smith*. 1 *Chan. Ca.* 124. S. C.

6. *A.* ſeiſed in fee, in truſt for *B.* for full conſideration conveys to *C*; the purchaſer having notice of the truſt; and afterwards *C.* to ſtrengthen his own eſtate, levies a fine; *B.* the *Ceſtui que Truſt*, in that caſe ſhall not be bound to enter within the fifth year. A caſe put by my lord chancellor, and agreed to by the counſel; for *C.* having purchaſed with notice, notwithſtanding any conſideration paid by him, is but a truſtee for *B.* and ſo the eſtate not being diſplaced, the fine cannot bar. 1 *Vern.* 149.

(B) *What charges and incumbrances on lands are barred and deſtroyed by fine and Recovery.*

1. IF *T. S.* ſeiſed in fee, deviſes to his children and others, ſeveral ſums of money, to be paid at diſtinct times, by 50*l. per Annum*, out of lands; and one payment of 50*l.* incurs due, and then the lands are aliened by fine, and five years and non-claim paſs, the deviſees are barred by the fine of theſe ſums, which grew due after the levying of it, but not of the 50*l.* which became due before; for a truſt is barred by a fine. *Wakeling* and *Warner*, *Hil.* 31 *Car.* 2. 2 *Chan. Ca.* 247. *Quære* of this caſe, for,

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2. If *J. S.* deviſes lands to *B.* in tail, remainder to *C.* in tail, ſubject to the payment of legacies; and *C.* levies a fine, and five years and non-claim paſs, and *C.* grants a rent-charge to *A.* and mortgages to *B.* yet the legacies are not barred by the fine, and non-claim; for *C.* having no title but under the will, the purchaſers muſt be preſumed to have notice of the legacies, and the contents thereof. *Trin.* 1710. *The Draper's Company* and *Yardley*, 2 *Vern.* 662.

3. To a bill to redeem a mortgage, the defendant pleaded a fine with proclamations of non-claim for five years; but the plea was overruled, the mortgagee having a right to retain the land, till his money was paid; and this was a new way of foreclоſing a man of his equity of redemption. *Hil.* 1682. *Welden* and *the Duke of York*, 1 *Vern.* 132. but *vide* 2 *Vern.* 189. where it is held, that a fine and non-claim ſhall be a bar to an equity of redemption; and there ſaid, that it had been ſo ruled by my lord chief Juſtice *Hale*, in Sir *Nicholas Stourton's* caſe.

4. A fine and non-claim is a good bar to a bill of review, *per* lord commiſſioner *Hutchins*. *Mich.* 1690 *Lingard* and *Griffin*, 2 *Vern.* 189, 190. 2.

(C) *What charges and incumbrances are made good by fine and recovery.*

1. IF tenant in tail confeſſes a judgment, or mortgages the lands, and afterwards ſuffers a recovery to a collateral purpoſe, that recovery ſhall enure to make good all his precedent acts and incumbrances. 1 *Chan. Ca.* 720. But if a fine is levied for a particular purpoſe, purſuant to a decree, equity will not permit any other uſe to be made of that fine. 1 *Chan. Ca.* 49. 2 *Vern.* 56. S. P. *arg'*.

2. *A.* deviſed to *B.* the father for life, remainder to *C.* his ſon, an infant in fee, and deviſed 400 *l.* to the ſon to be paid at twenty-one, and made the father executor, and left 2000 *l.* perſonal aſſets; and *B.* having ſpent the perſonal aſſets, mortgaged the lands to *J. S.* and made affidavit, that they were free from incumbrances, and that he was ſeiſed in fee, and levied a fine for corroborating the mortgage, and alſo declared the uſe thereof to him and his heirs; the ſon having entered for a forfeiture, the mortgagee brought his bill to be relieved; and the Court decreed, that the mortgagee, notwithſtanding the forfeiture, ſhould hold and enjoy the lands againſt the ſon, during the life of the father. *Hil.* 1699. *Willis* and *Finex*. *Prec. in Chan.* 108. S. C. *accord'*. 2 *P. Wms.* 146.

(D) *Where equity will ſupply a defect in a Fine.*

1. IF *Ceſtui que Truſt* in tail, being in poſſeſſion under the truſtee, who had the freehold in him, ſuffers a recovery, in which he himſelf is tenant, and ſo no good tenant to the *præcipe*; yet this ſhall bar the remainder in fee of the truſt. 2 *Chan. Ca.* 63. But it ſeems that if tenant in tail covenants to levy a fine, and he dies before it is executed, though the fine has proceeded to a caption, yet equity will not make it good, although for valuable conſideration. *Vide* 2 *Vern.* 5.

Pret. in Chan. 224. S. C. 2. *A.* has two ſons, *B.* and *C. A.* on the marriage of *B.* covenants, before the end of *Eaſter* term then following, to levy a fine to the uſe of *B.* and the heirs of his body, remainder to the uſe of *C.* and the heirs of his body, remainder to *A.* in tail, remainder to him in fee; the fine was levied as of *Eaſter* term, but the marriage being put off till after *Eaſter* term, the deed was not dated till after neither; ſo the fine was levied before the date of the deed, and by conſequence the deed was no declaration of the uſes of that fine; the father died, and then *B.* died, leaving iſſue *W.* and *W.* having borrowed ſome money of *J. S.* mortgages the lands to him, and dies without iſſue. *C.* claiming under the ſettlement, brings his Bill to have it eſtabliſhed, and that the defect before-mentioned may be ſupplied; but in regard the conſideration of *B*'s marriage did not extend to him, the court refuſed him any relief. *Mich.* 1703. *Stapkehill* and *Bully*.

(E) *Fines and recoveries, in what caſes vacated or ſet aſide in equity.*

1. A Having prevailed, by the means of an attorney, with a woman to levy a fine of ſome houſes, and to execute a deed, leading the uſes thereof to him and his heirs; and it being proved that ſhe, at the time of levying the fine, declared that ſhe muſt make uſe of ſome friend's name in truſt: and afterwards by will declaring, that ſhe only levied ſuch fine in truſt, the better to diſpoſe of her eſtate; and having deviſed it to *J. S.* ſubject to the payment of her debts, the court decreed not only the eſtate liable to the debts, but alſo a conveyance to *J. S.* the deviſee. *Mich.* 1693. *Woodhouſe* and *Brayfield*, 2 *Vern.* 307.

2. If lands are deviſed to truſtees, till debts paid, and then to an infant and his heirs, and *J. S.* a ſtranger enters on the lands, and levies a fine, and five years and non-claim paſs; and the infant when of age brings an ejectment, but is barred, becauſe the truſtees ought to have entered; yet equity will relieve, and not ſuffer an infant to be barred by the laches of his truſtees, nor to be barred of a truſt eſtate, during his infancy; and the infant in this caſe ſhall recover the mean profits. *Mich.* 1699. *Allen* and *Sayer*, 2 *Vern.* 368.

(a) *Vid.* 2 *Eq. Abr.* 474. *pl.* 1. (a)* 3. *A* having inveigled his wife to levy a fine of her land to him when ſhe lay upon her death-bed, pretending, as was ſuggeſted he

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was to have it only for his life; and a *dedimus* was ſent into the country to take the fine, and the caption was taken about 100 miles from *London*, the very day ſhe died; and becauſe the fine would not have ſtood, the party being dead before the king's ſilver was paid, the writ of covenant was raſed in the teſte, and made to bear date ten days backwards; and all other parts of the fine were raſed likewiſe, and made to correſpond with it; and the king's ſilver was paid, and ſo all appeared on the record to have been done before the death of the woman. On a bill brought to have the fine ſet aſide, or to have a reconveyance, it was held by the court, that though chancery has a power to relieve as much againſt a fine obtained by fraud or practice, as any other kind of conveyance; yet that ſuch relief was not by decreeing a vacate of the fine, but by ordering a reconveyance; but that for any error in the fine, or irregularity, or ill practice in the commiſſioners, it was a matter properly cogniſable in that court where the fine was levied, and for which that court may (*a*) vacate the fine, and there being no proof of fraud or practice in this caſe, the bill was diſmiſſed. *Hil.* 1700. *St. John* and *Turner.*

(*a*) Huſband and wife, the wife being but fifteen years old; levied a fine, and they being brought into the court of Common Pleas by complaint of the remainder-man, a vacate was entered of the fine, *quoad* the woman, and an information ordered to be exhibited againſt the commiſſioners. *Hutchinſon's* caſe, 3 *Lev.* 36. *vide* 2 *Vent.* 30. where a wife being an infant levied a fine, and ſhe being dead, it could not be ſet aſide; but the court held, that they might fine the commiſſioners, being in the nature of attornies, and liable to the cenſure of the court; but the wife being twenty, and therefore not t obe known by inſpection, it is an excuſe; by two judges againſt two.

CAP. XXXI.

Guardian.

(A) *Of the appointing and removing of a guardian.*
(B) *What acts of his, with reſpect to the infant's eſtate, ſhall be good.*
(C) *How to be charged, and how to account.*

(A) *Of the appointing and removing of a guardian.*

1. IF the father of an infant is indebted to *J. S.* and the father by deed grants him the guardianſhip of his children, with a covenant not to revoke it, and gives a penal bond for performance; and a bill is brought to bring the guardian to an account, and to remove him; the guardian is willing to do as the court ſhall direct; yet in regard there is a juſt debt due, the court will not reſtrain him from receiving the rents and profits, only from abuſing his perſon. *Hil.* 1686. *Lewis* and *Shiers*, 1 *Vern.* 442.

(a) 12 *Car.* 2. a father under age, or of full age, by deed in his life-time or by will, in preſence of two witneſſes, may diſpoſe of the

* 2. If a perſon appointed guardian purſuant to the ſtatute (a) 12 *Car.* 2. dies, or refuſes to take upon himſelf the guardianſhip, my lord chancellor may appoint a guardian; but a guardian cannot be otherwiſe appointed, than by bringing the infant into court, or his praying a commiſſion to have a guardian aſſigned him. *Hil.* 1699, *Loyd* and *Carew*.

cuſtody of his child under twenty-one years of age, and not married at the time of his death, whether then born, or *in ventre ſa mere*, during his nonage, to any in poſſeſſion or remainder other than popiſh recuſants; which perſons may maintain any action of treſpaſs, againſt wrongful takers away, or retainers of ſuch child, and recover damages for the child's uſe, and may take into their cuſtody his lands, perſonal eſtate, &c. according to ſuch diſpoſition, and bring actions as guardians in ſocage might do. This act ſhall not prejudice the cuſtom of *London*, nor any other city or town corporate, &c.

3. *A.* deviſed the guardianſhip of his ſon, who was ſeven years of age, to his wife, who was mother-in-law to the infant; and ſhe marrying meanly with her own ſervant, the uncle gets poſſeſſion of the infant

infant, and ſends him to be educated in a Proteſtant college in *France*; and upon a *Homine Replegiandio*, it was held by my lord chancellor, that tho' in caſe of a guardian by (*a*) common law, this court may remove him; yet here being a guardian according to the ſtatute, ſhe could not be removed, but that he would make her give ſecurity not to marry the infant *inter annos nubiles*, and the uncle was ordered to ſend for the boy. 29 *Car.* 2. *Foſter* and *Denny*, 2 *Chan. Ca.* 237.

(*a*) Vid. Harris's Juſt. Inſt. 70. 71. 72. 4to. Guardians at common law may be removed, or compelled to give ſecurity, if there appears any danger of their abuſing either the infant's perſon or eſtate; and there are ſeveral inſtances of this kind, as *Stile* 456. *Hard.* 96. 3 *Chan. Rep.* 58. 1 *Sid.* 424. 3 *Salk.* 177. but there are none where a ſtatute guardian has been totally removed. Some, where ſuch terms have been impoſed on the guardian, as effectually to prevent his doing any thing to the prejudice of the infant; but *quære*, whether ſuch cauſes may not ariſe, for which he may be totally removed, notwithſtanding the ſtatute; as if he becomes mad, lunatic, &c. A guardianſhip is not aſſignable; neither ſhall it go to the executors or adminiſtrators, being a perſonal truſt. *Vaugh.* 180.

4. (*b*) The court of Chancery may aſſign one of the ſix clerks to be guardian to an infant. 2 *Chan. Ca.* 163. *Nel. Chan. Rep.* 8*vo.* 44. S. P. 4. (*b*) The ſpiritual court may appoint a guardian to an infant till he is fourteen years old, who has only a perſonal eſtate; but if there be both real and perſonal eſtate, ſuch appointment is void. *Vide* 2 *Lev.* 162, 217.

(B) *What acts of his, with reſpect to the infant's eſtate, ſhall be good.*

1. THE plaintiff's father mortgages to *J. S.* and dies, leaving the plaintiff and *C.* heir at law, both infants; defendant as guardian enters on the lands, and with the profits paid off the mortgage, and took an aſſignment to other perſons; the defendant having married his daughter to *C.* who died without iſſue; it was inſiſted for the defendant that he paid off the mortgage with his own money, and that he had not enough of the infant's; and that if he had, he could not juſtify diſpoſing of it in ſuch manner (by which it would prevent its coming to the adminiſtrator); but it being proved that he called in part of the infant's rents for that purpoſe, and becauſe it was moſt for the infant's advantage to pay off the mortgage, it was ſent to an account: and if the profits received were ſufficient to pay it, the defendant was to convey; but if they fell ſhort, the plaintiff was to lay down as much as, with what the defendant laid down, would make it up. *Hil.* 22 *Car.* 2. (*c*) *Bridget Dennis*, by ſir *Alexander Frazier her committee*, and ſir *Thomas Badd*, 1 *Chan. Ca.* 156. *vide* 2 *Chan. Ca.* 197. where my lord keeper was of opinion, that a guardian ſhould pay off a judgment by the profits of the eſtate.

(*c*) 1 *Vern.* 436, S. C. cited and agreed to by my lord chancellor, becauſe the money the adminiſtra-

ould in equity be liable in his hands to diſcharge the mortgage; ſo he did r no wrong.

*2. An eſtate having deſcended to an infant, ſubject to incumbrances; d the queſtion being, whether a guardian might, without the direction a court of equity, apply the profits to diſcharge the incumbrances, the intereſt of them, or whether they ſhould not be accounted perſol eſtate; and ſo the adminiſtrator of the infant be entitled to them, if infant died in his minority: it was held by the court, that a guardian

dian, without any direction, may pay the intereſt of any real incumbrance, and the principal of a mortgage; becauſe that is a direct and immediate charge on the land; but not any other real incumbrance. *Hil* 1700. *Palmer* and *Danby*.

3. But where a widow, who was guardian to her ſon, received the rents and profits of his eſtate, and paid off debts by ſpecialty, but took aſſignments of the bonds; the ſon dying in his minority, ſhe brought her bill againſt the defendant the heir, for a diſcovery of aſſets by diſcent, to ſatisfy the money due by bond, ſhe claiming the profits as adminiſtratrix to her ſon; and it was held by the court, that the guardian was not compellable to apply the profits of the eſtate of the infant heir, to pay off the bond-debts. *Hil.* 1707. *Waters* and *Ebral*, 2 *Vern*, 606.

4. A guardian to an infant, having a conſiderable ſum of money in his hands, that was raiſed out of the infant's eſtate, lays out, with the conſent of his grandmother, 3000 *l.* in a purchaſe of land, which lay contiguous to the infant's eſtate; and takes the purchaſe in the name of *J. S.* for his benefit, if when he came of age he ſhould agree thereto, and allow that money on account. The infant dying in his minority, it was held by my lord chancellor, chief baron *Atkins*, and Mr. Juſtice *Lutwich*, againſt the opinion of the maſter of the rolls, that though neither the heir nor adminiſtrator of the infant were entitled to the lands, yet the guardian muſt account for this 3000 *l.* to the adminiſtrator of the infant; and that it was not in the power of the guardian, without the direction of this court, to turn the perſonal into real eſtate, by which it would deſcend to the heir; and that the objection, that an infant may make a will at ſeventeen of his perſonal eſtate, but not of his real, was not anſwered. *The Earl of Winchelſea* and *Norcliff*, 1 *Vern.* 403, 435. S. C.

5. If a guardian borrows money of *A.* to pay off an incumbrance on the infant's eſtate, and promiſes to give *A.* ſecurity for his money, but dies before it is done; though *A*'s money is applied to pay off the incumbrance, yet the court will not decree him ſatisfaction out of the infant's eſtate; but if the ſum diſburſed exceeds the profits of the eſtate, for ſo much, *A.* ſhall have an account as money due to the guardian, and it ſhall be raiſed out of the infant's eſtate. *Hil.* 1704. *Hooper* and *Eyles*, 2 *Vern.* 480.

(C) *Guardian, how to be charged, and how to account.*

1. IF a guardian takes a bond for the arrears of rent, he thereby makes it his own debt, and ſhall be (*a*) charged with it 36 *Car.* 2. *Wale* and *Buckley*, 2 *Chan. Rep.* 97.

(*a*) A Guardian on his account ſhall have allowance of all reaſonable expences; and if he is robbed of the rents and profits of the land, without his default of negligence, he ſhall be diſcharged thereof, upon his account. 1 *Inſt.* 89. *a.*

2. If a guardian to an infant whoſe lands are incumbred, to the value of 600*l.* buys it off with 100*l.* of the infant's money, he ſhall not charge the infant with the 600*l.* 2 *Chan. Ca.* 245.

3. If a guardian to an infant takes an aſſignment of the mortgage although the mortgagee never entered; yet *per* lord keeper *Wright*, as to the profits received out of the mortgaged lands, the guardian ſhall be taken to be in poſſeſſion as mortgagee, and not as guardian; but the reporter adds a Q. 2 *Vern.* 471.

CAP. XXXII.

Heir and Anceſtor.

(A) *By what acts of the anceſtors ſhall the heir general be bound.*
(B) *By what acts ſhall an heir ſpecial, or iſſue in tail, be bound.*
(C) *Heir, in what caſes favoured in equity.*
(D) *Where charges and incumbrances on the lands ſhall be raiſed, or ſhall ſink in the inheritance, for the benefit of the heir.*
(E) *Where the heir ſhall have the benefit and aid of the perſonal eſtate.*
(F) *In what caſes there ſhall be a reſulting truſt for the benefit of the heir.*
(G) *What things ſhall go to the heir, and not to the executor.*
(H) *What ſhall be aſſets by deſcent in the hands of the heir.*
(I) *Unreaſonable bargains and ſecurities obtained from young heirs, in what caſes to be ſet aſide.*

(A) *By what acts of the anceſtor ſhall the heir general be bound.*

2 *Freem.* 176. *S. C. accord.*

1 IF Lands are deviſed to the wife for life, and afterwards to be ſold by the executor for younger childrens portions, and the executor and wife die; the children may compel the heir to ſell, though the executor had only an (*a*) authority: ruled upon demurrer. *Mich.* 15 *Car.* 2. *Garfoot* and *Garfoot*, 1 *Chan. Ca.* 35.

(*a*) By the common law, if lands are deviſed to be ſold by an executor, by which he has only an authority, and he dies, no ſale can be made; ſo if an authority only be given to two, and one dies, the ſurvivor cannot ſell; but it is otherwiſe when an authority is given them, coupled with an intereſt, as by a deviſe of lands to them to be ſold. 1 *Inſt.* 112, 113, 181.

2. If

2. If *J. S.* deviſes his lands to his executors, to ſell and pay debts, the heir ſhall be compelled to join in the ſale; *per* lord keeper, who ſaid it had been ſo ruled in the houſe of lords. *Trin.* 27 *Car.* 2. *Fowle* and *Green*, 1 *Chan. Ca.* 262.

3. If lands are ſettled on truſtees for raiſing of maintenance and portions for daughters, and a bill is brought for a ſale, and that the heir might join; he ſhall be compelled to join, though it is objected that he has no legal eſtate in him. *Paſch.* 1689. *Roll* and *Roll*, 2 *Vern.* 99. where it is ſaid, that ſeveral caſes to that purpoſe were cited; *vide* the caſe of *Pit* and *Pelham*, 1 *Chan. Ca.* 176. ſeveral precedents quoted, where the lands were decreed to be ſold, though no executor named, or though he died before any ſale made. And *vide* 2 *Vern.* 420. where it is reſolved, that the heir may have the lands ſold, if it appears for his advantage, as well as the younger children may inſiſt upon a ſale.

4. If *A.* contracts to ſell lands, and receives good part of the purchaſe-money, but dies before a conveynance is executed, and a bill is brought againſt the heir, he ſhall (*a*) convey, and the money ſhall go to the executor; eſpecially if there are more debts due than the teſtator's perſonal eſtate is ſufficient to pay. *Mich.* 1692. decreed, *Hoſkins* and *Savoy*, S. P. 2 *Vern.* 215. *Baden* and *Counteſs of Pembroke*.

(*a*) If a man for 100*l* aſſumes to make a leaſe for 21 years, and dies; his heir is not compellable, in a court of equity, to make the leaſe; for this is againſt the common law. 3 *Jac.* 1 *Chapman* and *Boier*, 1 *Roll. Abr.* 377, 378. *Quære.*

(B) *By what Acts ſhall an heir ſpecial, or iſſue in tail, be bound*

1. IF tenant in tail bargains and ſells the lands, yet this cannot be made good in equity againſt the ſtatute, by which he is diſabled to bar his iſſue; reſolved *per* lord keeper and lord *Hobart*. *Cavendiſh* and *Worſley*, *Hob.* 203.

2. But of tenant in tail agrees to convey, he may be compelled in equity to execute the agreement; but if he dies, his iſſue is not bound thereby, unleſs he doth ſome act whereby he conſents to and confirms the agreement, *Trin.* 22 *Car.* 2, *Roſs* and *Roſs*, 1 *Chan. Ca.* 171. 1 *Lev.* 239. S. P. *in Cancellaria*. *Gilb. Hiſt. Chanc.* 249.

3. If tenant in tail agrees to ſell his lands, and receives part of the conſideration-money, and upon his not making good the ſale by a fine or recovery, a bill is brought to compel him thereto; and a decree pronounced accordingly; and he ſtauds out all proceſs againſt him to a contempt, and then dies without perfecting the ſale; yet his iſſue ſhall not be compelled to perfect it: adjudged on a bill brought againſt the iſſue to revive the decree. *Hil*, 1708. *Powel* and *Powel*, S. C. cited, and admitted by my lord chief baron *Gilbert*, in the argument of the earl of *Coventry*'s caſe, *Paſch.* 1724. for the heir comes in under the Statute *de donis* ſingly; and is not any way derived from the anceſtor who contracted.

Prec. in Chan. 278. S. C. *accord.* *Gilb. Chanc.* 250

If

4. If tenant in tail ſells at a full value and receives the conſideration-money, and covenants to levy a fine, and is decreed to do it; yet dying (though in priſon and in contempt for not performing the decree) the iſſue in tail cannot be bound by it *Weſt* and *Lower*, 2 *Vern.* 306.

(C) *Heir, in what caſes (a) favoured in equity.*

(a) *Vide* title *deviſe*, that an heir ſhall not be diſinherited by doubtful or ambiguous words.

1. IF *J. S.* deviſes lands to his wife for life and the heir claims the lands by intail, and prays a diſcovery of the writings, which by order are brought into court, and on a motion *ex parte* given to the heir, and among them the deed of intail is found; and the wife inſiſts on having back the deed unleſs the heir would confirm her eſtate, and that ſhe is more than a bare volunteer, it being a proviſion for her; yet it not appearing to be purſuant to marriage-articles, it ſhall be conſidered only as a bounty, and the heir having a good title ſhall be aided. *Mich.* 32 *Car.* 2. 2 *Chan. Ca.* 4.

2. If a huſband and wife levy a fine of the wife's lands, and by the deed the uſe is declared to the huſband and his heirs, and the huſband without any conſideration, deviſed it to *J. S. J. S.* being a voluntary deviſee ſhall have no aid in equity for the deed againſt the heir of the mother, but will be left to help himſelf at law as he can. *Hil.* 34 *Car.* 2. 2 *Chan. Ca.* 134.

3. If *J. S.* by will deviſes 3000 *l.* to his three younger children, which ſum was a mortgage due from *J. T.* and by his will adds, that for the more ſure payment of it, that in caſe his ſon and heir whom he appointed executor ſhould not pay the ſame according to his will, then he deviſed the lands for the payment thereof, and appoints it to be paid them at twenty-one, or marriage, which ſhould firſt happen, and a maintenance out of his land in the mean time, and *J. T.* obtains a decree for redemption of his mortgage, on payment of the money againſt the executor and the infants, who appeared by their mother as guardian; and the money is brought into court and placed out by the maſter, on a ſecurity which proves ill; yet the heir ſhall not be compelled to pay it over again to the younger children; for the lands are made only ſupplementally chargable in caſe *J. T.* had failed, or in caſe the heir and executor had received and refuſed to pay it to the children; and though a real ſecurity for childrens portions ſhall not be changed into a perſonal one; yet in this caſe it was not in the power of the heir to prevent *J. T.*'s redeeming the mortgage. *Mich.* 1685. *Oldfield* and *Oldfield*, 1 *Vern.* 336.

4. If an eſtate is limited to truſtees for payment of debts and legacies, and the truſtees raiſe the whole money, but do not apply it according to the truſt; yet the heir ſhall have the lands diſcharged, and the legatees muſt take their remedy againſt the truſtees; for the money being once raiſed, the lands ſhall be diſcharged. 1 *Salk.* 155 *in Domo Procerum.*

5. But if *A* being tenant for life, remainder to his firſt ſon in tail, remainder over, has a power to charge the eſtate with 250 *l. per ann.* annuity, for any term not exceeding four years, and *A.* does by deed charge the premiſes with 250 *l. per ann.* for four years, to commence from his death, in truſt to raiſe 1000 *l.* part to be paid to *B.* and the other part to *C.* the ſon pays *B.* what was due to him, and he delivers up the deeds, and they are ſuppreſſed, and the ſon takes the profits for four years, and more, and leaves a daughter his heir at law, and leaves no perſonal aſſets; the lands ſhall be liable in the hands of the daughter to pay *C.* with intereſt, though the term for years is expired, and the perſon dead who received the profits. *Mich.* 1690. *Smith* and *Smith*, 2 *Vern.* 178.

(D) *Where charges and incumbrances on the land ſhall be raiſed, or ſhall ſink in the inheritance for the benefit of the heir.*

1. J. S. by ſettlement charged his lands with the payment of 4000 *l.* a-piece to his two daughters, to be paid them at their reſpective ages of twenty-one years, or days of marriage, and reſerved to himſelf a power of otherwiſe ordering it by his will; and by his will made within a day after, he confirms their portions, and that they ſhall be paid as mentioned in the ſettlement; one of the daughters dies before twenty-one, and unmarried, and her mother ſued for the portion as adminiſtratrix to the daughter; but it was held, that this portion ſhould not be raiſed, but ſhould ſink in the inheritance for the benefit of the heir at law; though it was admitted, that if it had been a ſum of money deviſed, and the the legatee had died before the time of payment, it would have gone to the adminiſtrator; but here the ſettlement is operative, and the wife is a jointreſs otherwiſe provided for. *Paſch.* 1 *Jac.* 2. *Pawlet* and *Pawlet*, 2 *Vent.* 366, 367. 1 *Vern.* 204 & 324. S. C. where a note is added, that it was affirmed in the houſe of peers. S. P. admitted in the caſe of *Edwards* and *Freeman*, *Mich.* 1727. and S C. cited.

2 *Chan. Rep.* 286. S. C. 2 *Freem.* 93. S. C. under the name of Lord *Paulet's* caſe.

This has been the eſtabliſhed rule ever ſince, though caſes prior in time may be found differently determined. *Per Hardwicke* C. *Mich.* 1738. Hall and *Terry.* 2 *Freem.* 254. S. C.—*Prec. in Chan.* S. C. 195. 1 *Atk.* 356 P. C. *Brown's Rep.* 194. S. C.

2. If a term is created by a marriage-ſettlement, to raiſe 3000 *l.* for daughters portions within twelve months after the death of the ſurvivor of the huſband and wife; and there being but one daughter, the father by will deviſes the truſt lands to make good his wife's jointure, and to raiſe 3000 *l.* for his daughter's portion; the daughter dies at the age of five years, the portion being to be raiſed out of land; as ſhe could have no occaſion for it at that age, it ſhall not be raiſed for the benefit of her adminiſtrator. *Paſch.* 1702. *Breuen* and *Breuen*, 2 *Vern.* 439. *Note; the daughter died within the year, but it does not ſo appear by this report.*

3. Upon a marriage-ſettlement, a term was created for raiſing portions for younger children, viz. 1000 *l.* to the eldeſt of the younger ſons, and 500 *l.* to every other younger ſon, and ſo for the daughters, to be paid at ſuch time as the truſtees in their diſcretion ſhould appoint; the father leaves two ſons and two daughters; the youngeſt ſon, before any appointment made by the truſtees, dies at ſeventeen, being then an ap-

Prec. in Chan. 213. S. C. *accord.*

prentice; and it was held, that though there was no time limited for the raiſing of it, by which it was urged to be an intereſt veſted; yet as he died before he could have any occaſion for it, and before any appointment by the truſtees, that it ſhould ſink in the inheritance, and not go to his ſiſters, who had taken out adminiſtration to him. *Hil.* 1702. *Warr* and *Warr*.

4. If one deviſes 1000*l.* to his daughter for her portion, charged upon a real eſtate, and payable at twenty-one, and the daughter dies before twenty-one, the portion ſhall ſink in the land; but it is otherwiſe if no time had been limited for the payment of the portion; for in that caſe it goes to the executors of the daughter; and there is no difference where the portion is ſecured by a ſettlement or will, if ſecured out of a real eſtate, and the party die before it is payable; for in either caſe it ſinks in the lands. *Mich.* 1688. *Smith* and *Smith*, 2 *Vern.* 92. *Vide* 2 *Vern.* 416. S. P reſolved, and there ſaid, *that there was no difference where the land was charged by will, and where by a ſettlement.*

Vide the caſe of *Jennings* and *Looks*, S. P. *Eq. Ca. Abr.* Part 2.

5. So where one by will charged his lands with 6000 *l.* for the child with which his wife was *privement enſeint*, if it proved a daughter, with a clauſe of entry for non-payment: a daughter is born, who dies; and it was decreed that the 6000 *l.* ſhould not be raiſed for the benefit of her adminiſtrator. *Hil.* 1690. *Norfolk* and *Giſſord*, 2 *Vern.* 208.

6. But where lands are deviſed to be ſold for payment of portions to younger children, and one of the children dies after the portion becomes payable, though before the land ſold, yet his adminiſtrator ſhall have it, being an intereſt veſted. *Mich.* 1684. *Bartholomew* and *Meredith*, 1 *Vern.* 276. *Vide* 2 *Vern.* 508. where a portion to be paid purſuant to a marriage-ſettlement, was held an intereſt veſted, being made to carry intereſt, though the party died before it became payable.

7. So where on a marriage-ſettlement lands are limited to the huſband for life, remainder to the wife for life, remainder to the firſt, &c. ſons of the marriage in tail male, remainder to *J. S.* in fee; provided, if there be no iſſue male of the marriage, and there be one or more daughters living at the huſbands's death, then the truſtees to ſtand ſeiſed, ſubject to the jointure, to the intent ſuch daughter or daughters ſhould receive out of the rents 10000 *l.* and 100 *l. per ann.* maintenance; but no time limited for the payment of the portions; the huſband dies, leaving only one daughter who lives to ſeventeen, and by will diſpoſes of the 10000 *l.* and it was decreed, that this was a veſted intereſt in the daughter, and well diſpoſed of by her will. *Trin.* 1688. *Earl Rivers* and *Earl of Derby*, 2 *Vern.* 72.

Prec. in Chan. 109. 16 *Vin. Ab.* 446 *c.* 5. S. C. 2 *Vern.* 424 S. C. 1 *Vern.* 462. 1 *Vez* 208. 1 *Ath.* 361. 2 *Ath.* 184. *Brown's Rep.* 163, 303, 395: 1 *P. Wms.* 401 2 *P. Wms.* 610. 3 *Wms.* 134.

8. If *A* by will gives 500 *l.* to his daughter, to be paid by his executors, at the age of twenty-one out of his perſonal eſtate and rents of his real; and if not raiſed by that time, the executors to ſtand ſeiſed, and take the rents till the 500 *l.* is raiſed; and after payment gives the land to his ſon; the daughter marries at eighteen, and dies under twenty-one, leaving iſſue a daughter; the huſband takes adminiſtration; the portion ſhall be raiſed, and that by a ſale, tho' the land, by reaſon of incumbrances, will produce lit-

Hil. 1609. *Jackſon* and *Farrant* S. C. ſays lord chancellor directed an account of the eſtate, and then he would give his opinion; but inclined ſtrongly that the portion was payable by reaſon of the marriage, marriage being the cauſe of portions. *Note*; the portion was not ſaid to be paid at twenty-one, or marriage. The authority of this caſe is queſtioned, and the caſe itſelf termed an anomalous caſe; *per Hardwicke* C. in *Cotten* and *Cotten*, *Mich.* 12 *Geo.* 2. MS. Notes.

tle more than the 500*l.* Decreed *Paſch.* 1701. *Jackſon* and *Farrand*, 2 *Vern.* 424.

*9. An eſtate was deviſed to the eldeſt ſon; provided he or his heirs pay 100*l.* a-piece to his three ſiſters, at their age of twenty-one, or marriage; one of the daughters dies before twenty-one unmarried; after *J. S.* buys the eſtate, and thinking it ſubject to the dead daughter's portion (a bill being brought for it in this Court) gave bond to her executrix to pay it; but being afterwards adviſed, that the land would not be liable, he brings his bill to be relieved againſt it; and it was held by my lord keeper; that though by the law now uſed in this court, the land would not be liable to the portion; yet perhaps when the bond was given, it might have been otherwiſe taken; and there being no fraud in getting the bond, he would not relieve againſt it. *Mich.* 1702. *Smith* and *Avery*.

10. Upon a marriage-ſettlement a term was created for raiſing portions for daughters at eighteen, or marriage; there was a ſon and a daughter of the marriage; the ſon died; and the inheritance deſcended to the daughter, who attained her age of eighteen years; and then fell ſick, and in her ſickneſs made her will, and thereby gave ſome ſmall legacies, and then gave all, whatſoever ſhe had a power to diſpoſe of, to her mother, and made her executrix, and died, not having attained her age of twenty-one years; and the queſtion was, whether, by the deſcent of the inheritance to the ſame perſon that was to have the portion raiſed, the land ſhall be thereby diſcharged of the portion, or whether the defendant ſhould have right to it by the will of her daughter; it was decreed for the mother; and that the land could not be diſcharged of the portion till the daughter had been of age to make her election to have it ſo; eſpecially ſhe having made her will, and in general words deviſed it to her mother: On an appeal to the lords this decree was affirmed. *Hil.* 1701. *Thomas* and *Keymis*.

2 *Freem.* 207. Hil. 1696. S. C. ſays, lord keeper deſired to ſee precedents and afterwards gave his opinion, that the portion was not extinguiſhed but paſſed by the will. Decree affirmed in *Dom' Proc'*, *Ibid.* 209. 2 *Vern.* 348. Hil. 1697. S. C. at large.

11. A term was created for raiſing a daughter's portion; but it being extinguiſhed by the deſcent of the inheritance on the daughter; it was revived again in equity, for the benefit of creditors. *Powell* and *Morgan*, a caſe cited 2 *Vern.* 208. *vide* title *Creditor and Debtor*.

S. C. 2 *Vern.* 90.

(E) *Where the heir ſhall have the benefit and aid of the perſonal eſtate.*

1. IF an heir is ſued upon a bond-debt of his anceſtor's, in which he is bound, and he pays the money, the executor ſhall reimburſe him as far as there are perſonal aſſets of the teſtator's come to his hand. *Paſch.* 18 *Car.* 2: *Armitage* and *Metcalf*; 1 *Chan. Ca.* 74. *vide* 2 *Chan. Ca.* 5. That the perſonal eſtate in the hands of the executor ſhall be employed in eaſe of the heir, by whatever means the heir became indebted as heir; for the perſonal eſtate having received the benefit by contracting the debt, it is reaſonable that ſatisfaction ſhould be made out of it.

2. If a man mortgages lands, and covenants to pay the money, and dies, the perſonal eſtate of the mortgagor ſhall, in favour of the heir, be applied to exonerate the mortgage. *Cope* and *Cope*, 2 *Salk.* 449. *in Canc'*.

3. But

3. But if the grandfather mortgages, and covenants to pay the mortgage-money, and the lands deſcend to his ſon, and his ſon dies, having a perſonal eſtate and a ſon, the ſon's perſonal eſtate ſhall not go in aid of this mortgage. 2 *Salk.* 450.

4. So where *A.* mortgages his land to *B.* and afterwards ſells it to *C.* for 1000*l.* which includes the mortgage-money, *C.* ſhall pay the mortgage, and ſhall have no aid of the perſonal eſtate of *A.* for he has made it his own debt. 2 *Salk.* 450. *vide* 1 *Vern.* 37. that where the equity of redemption is purchaſed, the mortgage ſhall not be diſcharged out of the perſonal eſtate.

5. If lands in mortgage are deviſed to *J. S.* the deviſee ſhall not have aid of the teſtator's perſonal eſtate in the hands of the executor. *Hil.* 27. *Car.* 2. *Corniſh* and *Mew*, 1 *Chan. Ca.* 271. *vide.* 1 *Vern.* 36. 7. *Pockley* and *Pockley cont'*, where it is held by my lord chancellor, that not only the heir, but likewiſe a deviſee, or *Heres Factus*, ſhall have the benefit of the perſonal eſtate; and 2 *Chan. Ca.* 84. S. C. and S. P. and that debts ſhall be paid ut of the perſonal eſtate in favour of a deviſee, though a widow, who claims a third by the cuſtom of the province of *York*, is prejudiced thereby. 2

6. If there be no covenant in the deed for the payment of the mortgage-money, yet the perſonal eſtate ſhall be liable in the hands of the executor. 2 *Salk.* 449. 1 *Vern.* 436. S. P. *arguendo.*

† 7. But if a mortgage in fee is made redeemable at *Michaelmas* 1710. or at any other *Michaelmas*, on ſix months notice, and no covenant to pay the money; and the mortgagor continues in poſſeſſion, pays the intereſt, and by will deviſes his perſonal eſtate to his wife and daughter; the perſonal eſtate is not liable in eaſe of the real, there being no covenant either expreſſed or implied. *Mich.* 1715. *Howell* and *Price*, 2 *Vern.* 701.

* 8. If an heir has lands deſcended to him, incumbered with a mortgage, and he, before any application made by him to have aid of the perſonal eſtate, diſpoſes of them, he cannot afterwards come upon the perſonal eſtate; for the equity that an heir has, is that the lands may deſcend clear to the family. *Mich.* 1702. *Wood* and *Fenwick.*

9. If a man makes a ſettlement of his eſtate on truſtees, for performance of his will, and payment of debts and legacies, and at the ſame time makes his will, and thereby deviſes that the truſtees ſhall pay ſeveral legacies, and that the ſurplus ſhall go to the heir, and makes his wife executrix, but does not expreſly deviſe the perſonal eſtate to her; the perſonal eſtate in this caſe ſhall be applied in eaſe of the real. *Hil.* 28 *Car.* 2. *Lord Grey* and *Lady Grey*, 1 *Chan. Ca.* 296.

10. If lands be deviſed for the payment of debts and legacies, and the reſidue of the perſonal eſtate be given to the executors, after the debts and legacies paid, the (*a*) perſonal eſtate ſhall notwithſtanding, as far as it will go, be applied to the payment of the debts, and the land charged no further than is neceſſary to make up the reſidue. *Paſch.* 32 *Car.* 2. 2 *Vent.* 349.

† 1 Will. rep. 291. S. C. ſays, on arguing the caſe 28 *Oct.* 1717 on the equity reſerved after the trial of an iſſue that had been directed by the court, lord chancellor ſeemed to be ſtrongly of opinion that the perſonal eſtate ſhould be applied in eaſe of the real, the teſtator having ſaid in his will that his executors ſhould, *by his perſonal eſtate, pay and levy his debts*; and this mortgage-money plainly appearing to be a debt, wherefore his lordſhip decreed in favour of the heir. *Ibid.* 295.—*Pr. in Ch.* 423. S. C. no decree, but precedents to be ſearched. *Note*; this was a Welch mortgage, and the laſt book ſays it is a common practice in Wales to make mortgages in this manner with deſign to keep the eſtate for ever in their own family *Ibid.* 225.—Gilb. *Eq. Rep.* 106. S. C. *in totidem verbis* with *Prec. in Chan.* 1 *P. Wms.* 291, S. C, 1 Salk 450.

(*a*) By the ſeveral caſes adjudged on this head, the general rule appears to be, that the heir at law ſhall have the perſonal eſtate in exoneration of the real unleſs there be expreſs words to exempt it, or unleſs the intent of the teſtator ſtrongly appear that it ſhould be exempt. In the caſe of Tipping and Tipping, *Mich.* 1721, Macclesfield C denied it to be a rule, that in all caſes the perſonal eſtate is applicable in eaſe of the real; for it ſhall not be ſo applied if thereby the payment of the legacy will be prevented, much leſs when it will deprive a widow of her *bona paraphernalia.* 1 *Will. Rep.* 730.

11. If a man deviſes lands for payment of his debts, and makes an executor, and leaves a perſonal eſtate, no part of the perſonal eſtate ſhall go to the payment of the debts; becauſe by making of an executor, the teſtator's intent appears, that the executor ſhould have the goods, the teſtator having made another proviſion for the payment of his debts; but if a man diſpoſes of lands for the payment of his debts, and after dies inteſtate, the perſonal eſtate ſhall be chargeable in the hands of the adminiſtrator; for no ſuch intent appears, as before; *per* ſerjeant *Fountain*, and admitted by the maſter of the rolls. 18 *Car.* 2. *Feltham* and *Harlſton*, 1 *Lev.* 203, Q, and *vide* 2 *Vern.* 120. That a deviſee of lands charged ſhall have it before an executor, unleſs it be expreſly deviſed to him.

Quer. of this caſe, as it has often been held that not only the intereſt of an executor, but of the reſiduary legatee of the ſurplus ſhall be poſtponed to that of the heir in this caſe, otherwiſe in caſe of a particular or determinate legatee.

& vid. as authorities againſt this caſe, Gilb. Eq. rep. 72. 2 Equ. *Abr.* 494. pl. 8—504. pl. 44. 2 *Vent.* 349, 359. *Anon.* Nels. Chanc. rep. 203—2 *Vern.* 302, 309. *Chanc. Caſ.* 297. Gilb. *Hiſt. Chanc.* 313. 2 *Vern.* 302. is a caſe expreſly in point, againſt this even tho' there be an expreſs deviſe to the executor; as expreſſio eorum quæ tacitè inſunt nihil operatur.

12. If a man deviſes his fee-farm rents to be ſold for payment of his debts, and the ſurplus to go betwixt his heir at law and his younger brother, and deviſes his houſhold-goods to go with his houſe, and the reſidue of his perſonal eſtate to his ſiſter; the perſonal eſtate ſhall not be applied to pay debts in eaſe of the real. *Mich.* 1716. *Wainwright* and *Bendlowes*, 2 *Vern.* 718 and *per* lord chancellor, there is a difference where an eſtate is only charged with payment of debts, and where it is deviſed to be ſold out and out to pay debts. *Vide* 2 *Vent.* 359. And that in the firſt † caſe, the reſidue of her perſonal eſtate ſhall not go in exoneration of the real.

Prec. in Chan. 451. S. C. *accord'*. Gilb. *Eq. rep.* 125. S. C. *in totidem verbis* with *Prec. in Chan.* 313. *Brown's rep.* 143 454, to 457. *vid. Gilb. rep. Chanc.* 313.
† *laſt qu.*

* 13. *A.* by will gives ſeveral pecuniary legacies, and after deviſes lands to truſtees and their heirs, in truſt that they do and ſhall, by mortgage or ſale of the ſaid premiſes, or any part thereof, pay and ſatisfy his debts and the ſaid legacies and funeral expences; then he deviſes all his goods, chattels and houſhold-ſtuff in ſuch a houſe to another; and then goes on in theſe words, *all the reſt and reſidue of my perſonal eſtate I give and deviſe to my wife, whom I make ſole executrix. Per Cur'*, the reſidue of the perſonal eſtate belongs to the wife, in the nature of a ſpecifick legacy, exempt from debts, legacies and funerals; for though the perſonal eſtate is the natural fund for them, yet here he has expreſly provided another for that purpoſe, by words of an imperative ſignification, *that truſtees do and ſhall*, &c. which is ſtronger than a bare charge of them on his real eſtate, and might be intended only auxiliary to his perſonal eſtate, which, without words of exemption, might be liable in the firſt place; and though the words *reſt and reſidue of his perſonal eſtate*, are generally underſtood, reſt and reſidue after debts, legacies and funerals; yet here they are relative to the laſt antecedent of the deviſe of his goods, chattels and houſhold-ſtuff at ſuch a houſe, and paſs to his wife as a ſpecifick deviſe in the ſame manner as the next preceding deviſe did to the deviſee thereof, and are to be underſtood the reſidue of what he had not before particularly deviſed; not the reſidue after debts paid. *Hil.* 1724. *Adams* and *Meyrick* at the rolls.

(F) *In what caſes there ſhall be a reſulting truſt for the benefit of the heir.*

1. IF lands are appointed to pay debts, the heir is intitled to have the lands when the debts are paid; if to be ſold, he is intitled to the ſurplus; but if there be any abuſe, he muſt take his remedy againſt the truſtee, and not againſt the purchaſer. 34 *Car.* 2. *Culpepper* and *Aſton*, 2 *Chan. Ca.* 115. Q. If not in ſome caſes againſt a purchaſer; and *vide* of what things a purchaſer muſt take notice at his peril, title *Notice*.

2. If a term for years is created for a particular purpoſe; as to raiſe portions, &c. the ſurplus ſhall go to the heir. 1 *Salk.* 154.

3. But where *J. S.* made her will in the following words, viz. *I ordain and conſtitute* H. N. *to be my executor of this my laſt will, and I do give all my eſtate, real and perſonal, to diſpoſe of for the payment of all my juſt debts, and for the performing of all ſuch legacies as I have herein, or by the codicil annexed, bequeathed unto my executor above-named;* and gives ſeveral legacies in money, and amongſt others 200 *l.* to her uncle, who was heir at law; and by a codicil gives the ſiſter of H. N. her executor 500 *l.* but gives him nothing; and it was held by my lord keeper and four judges, that there was no reſulting truſt for the benefit of the heir, and that H. N. had a fee, for otherwiſe he would reap no benefit by the deviſe. *Hil.* 22 *Car.* 2. *North* and *Crompton*, 1 *Chan. Ca.* 196, 197.

4. If lands are deviſed to truſtees to ſell, and out of the money ariſing by ſale, amongſt other ſums, to pay 100 *l.* to his heir at law, and no diſpoſition is made by the teſtator of the ſurplus of his eſtate, the land ſhall not be turned into perſonal eſtate; nor more ſold than is neceſſary to pay the legacies; and the heir ſhall have the reſidue as a reſulting truſt. *Paſch.* 1701 *Randall* and *Bookey*, 2 *Vern.* 425.

Prec. in Chan. 162. S. C. *accord'.* 6 *Coke* 16 9 *Mod.* 171. 2 *Chan. Ca.* 115, 121. S. C. 1 *P. Wms.* 390, 550. S. C. 3 *P. Wms* 22, 252. 1 *Atk.* 620---21 *Vin. Abr.* 499. (*n*)

5. So if *A.* by will deviſes his land to truſtees to ſell, and to diſpoſe of the money as he by writing would appoint; and for want of appointment, to his four nephews, and *A.* by writing appoints his truſtees to pay ſeveral ſums to ſeveral perſons, but not near the value of the land; the heir ſhall have the reſidue, and not the nephews, as an intereſt reſulting and not diſpoſed of. Decreed *Hil.* 1706. *The city of London* and *Garway*, 2 *Vern* 571.

6. If *A.* deviſes his real eſtate to executors, to be ſold for payment of debts, the ſurplus, if any be, to be deemed perſonal eſtate, and go to his executors, to whom he gives 20 *l.* a-piece, the ſurplus ſhall be a truſt for the heirs at law.*(a)* Decreed and affirmed in the houſe of lords. *Counteſs of Briſtol* and *Hungerford* 2 *Vern.* 645

(*a*) It ſhould be "next of kin in courſe of diſtribution"--- *Vid. Prec. Chan.* 81 S. C. 3 Will. rep. 194. S. C. in Not. reported from the regiſter's book; and the cauſe of Mr. Vernon's miſtake was, that the next of kin happened to be alſo heirs at law to the teſtator.

7. If lands are deviſed to three perſons and their heirs, to the uſe of them and their heirs, upon the truſts after-mentioned, and then the teſtator directs them to convey part to *A.* for life, and other part to *B.* in tail, but gives no direction as to the remainder in fee, tho' two of the truſtees be related to the teſtator; yet the remainder will not belong to them, but be a reſulting truſt for

benefit of the heir. *Hil.* 1709, *Hobart* and *Counteſs of Suffolk*, 2 *Vern.* 644.

Prec. in Chan. 31. S. C. *accord*, and the heir to join in a ſale of the lands. Ibid. 32. 2 *Vern.* 247, S. C.

8. But where *J. S.* by will deviſed to his couſin *T. M.* by name, all his meſſuage called, *&c.* to have and to hold to him and his heirs for ever in truſt, to be ſold for the payment of all his debts and legacies, within a year after his death; and makes him executor; but gives him no legacy, though he was as nearly related to him as the heir at law: and it was held by two lords commiſſioners againſt one, that there ſhould be no reſulting truſt; for then the executor, who was taken notice of as couſin, would have nothing but his labour for his pains. *Mich.* 1691. decreed, *Cuningham* and *Melliſh*; which was affirmed in parliament. (*a*)

Qu. Did not he take the perſonal eſtate as executor, excluſive of the deviſe in truſt? & may not the teſtator think that a ſufficient bequeſt to him, and intend the ſurplus of the real eſtate (if any) as a reſulting truſt for his heir at law. (*a*) *Lord Hardwicke*, in the caſe of *Hill* and *Smith*, *Trin.* 12 *Geo.* 2 ſaid that he had looked into the journals of parliament, and could not find that this caſe was affirmed, *MS. Notes.*

(G) *What things ſhall go to the heir, and not to the executor.*

1. IF there be a mortgage in fee, and two deſcents caſt, and there is more due on it than the value of the land; and though the mortgagor ſays he will not redeem, yet it ſhall go to the (*b*) executor, and not to the heir; the equity of redemption not being foreclоſed or releaſed. *Mich.* 1699. *Tabor* and *Grover*, 2 *Vern.* 367.

(*b*) To whom the mortgage-money is to be paid, vide title *mortgages*, letter (B)

2. But if a mortgagee in fee enters for a forfeiture, and after ſeven years enjoyment abſolutely ſells the lands to *J. S.* and his heirs; this eſtate ſhall not be looked upon to be a mortgage in the hands of *J. S.* ſo as to make it part of his perſonal eſtate; but it ſhall be for the benefit of the heir. *Mich.* 1684. *Cotton* and *Iles*, 1 *Vern.* 271.

3. If a man has ſeveral mortgages, one of which is a mortgage in fee, on which he entered for a forfeiture; and he deviſes thoſe lands which were mortgaged in fee, to his two daughters and their heirs; and the other mortgages to them, their executors, *&c.* and one of the daughters dies, her ſhare of the mortgaged lands in fee ſhall go to her heir, and not to her adminiſtrator; for it was the teſtator's intent, that thoſe lands ſhould paſs as real eſtate, though between him and the mortgagor they were but a mortgage. *Hil.* 1706. *Noys* and *Mordaunt*, 2 *Vern.* 581.

Prec. in *Chan.* 265. S. C. *accord*, Gilb. Eq. Rep. 2. *S. C.* and decree.

4. If the heir of the mortgagee forecloſes the morgagor, yet the lands ſhall go to the executor, unleſs the heir thinks fit to pay him the mortgage-money, and then he may have the benefit of the mortgage. 2 *Vern.* 67.

5. If money by marriage-articles be agreed to be laid out in land and ſettled on the huſband and wife for life, remainder to their iſſue, remainder to the huſband in fee; with a proviſo, that in caſe the huſband died without iſſue, the wife might make her election, whether ſhe would have the land or money: the huſband dies before any purchaſe made, leaving his wife *enſeint* of a daughter, who was born ſoon after his death, but died at a month old; this money ſhall not be laid out in a purchaſe, for the benefit of the heir of the huſband, but ſhall go to the wife, as adminiſtratrix to her huſband and daughter; but it would be otherwiſe, had

a bill been brought in the life-time of the infant; *per North* lord keeper. *Hil.* 1684. *Kettleby* and *Atwood*, 1 *Vern.* 298, 299. But this decree was reverſed by lord *Jefferies*, who held, that the money was bound by the marriage-agreement. 1 *Vern.* 471. But if money be agreed to be laid out in land, in a marriage-ſettlement, and there is no iſſue, whether this money ſhall be looked upon as land, and thereby defeat ſimple contract-creditors, *Quere.* 1 *Salk.* 154.

6. If the wife's portion, and the like ſum of the huſband's money, is agreed to be laid out in lands, to be ſettled on them and the heirs of their bodies, without mentioning how the remainder over ſhould be limited, and they both die without iſſue, and before any purchaſe made; the money ſhall be paid to the heir of the huſband and not to the adminiſtratrix of the wife, though ſhe ſurvived the huſband. *Paſch.* 1687. *Knight* and *Atkyns*, 2 *Vern.* 20, 21. 520. 2 *Chanc. Rep.* 400. *Gilb. Chanc.* 246. 3 *P. Will. Rep.* 217.8 *Prec. Chan.* 252. 2 *Wils.* 329.

Prec. in Chan. 23. *Eaſter* 1691. S. C. ſays, *Trevor* and *Rawlinſon* were of opinion that the money ſhould not be laid out in land, but ſhould go to the adminiſtrator of the huſband, for that there was no child nor

7. If by marriage-articles it is agreed, without any poſitive covenant, that 500 *l.* being the wife's portion, ſhould by the conſent of the huſband and wife be laid out in lands, and ſettled on the huſband and wife for their lives, remainder to the heirs of their two bodies, remainder to the heirs of the body of the wife, remainder to the wife's brother in fee, and the wife, dies without iſſue and then the huſband dies; the 500 *l.* not being laid out; this money ſhall not be taken as land, and therefore go to the brother, to whom the fee was limited; *per Trevor* and *Rawlinſon*, lords commiſſioners, againſt *Hutchins*, *Paſch.* 1691: *Symons* and *Rutter*, 2 *Vern.* 227. *Gilb. Chanc* 247-8.

creditor in the caſe; and they did not take it to be the primary intent of the articles to have land purchaſed, there being no expreſs agreement to purchaſe but only that it might be purchaſed, if the huſband and wife ſhould elect and agree to have it ſo; but *Hutchins cont'*, he thought that the intent of the parties was that lands ſhould be purchaſed, and that for the remainder-man the court ought to decree; and relied on the caſe of *Annand* and *Honeywood*, *Withwick* and *Jermy*, *Attwood* and *Kettleby*, formerly adjudged in this court. *Vid.* 3 *Will. Rep.* 218-9. This caſe examined, and Hutchins opinion approved by *Jekyl* maſter of the rolls.

8. If a man purchaſes lands in his own name, and takes an aſſignment of a mortgage term in the name of a truſtee, yet the term ſhall attend the inheritance, and go to the heir. *Hil.* 1680. *Tiffin* and *Tiffin*, 1 *Vern.* 1.

9. So if a purchaſer takes the mortgage term in his own name, and the inheritance in the name of a truſtee, yet it ſhall go to the heir, though not mentioned to attend the inheritance. *Mich.* 35 *Car.* 2. *North* and *Langton*, 2 *Chan. Ca.* 156. 2 *Chan. Rep.* 271. S. C. But where a term attending on the inheritance ſhall or ſhall not be aſſets, *vide* what ſhall be aſſets, title *executor and adminiſtrator.*

Prec. in Chan. 252. S. C. 2 *Freem.* 288. S. C. *accord.*

10. If a woman, who is a *ceſtui que truſt* of a term having the inheritance in her, marries and dies; the term ſhall attend the inheritance, and not go to the huſband as adminiſtrator of his wife. *Mich.* 1705. *Beſt* and *Stamford*, 2 *Vern* 520. 1 *Salk.* 154. S. C.

11. If the plantiff's father ſeiſed in fee of lands, articles to pay J. S. 1000 *l.* to build an houſe on the premiſes, and dies before the houſe is built, the heir may compel the builder to build it, and the father's executor to pay for it. decreed between *Holt* and *Holt*, *Mich.* 1694. 2 *Vern.* 322.

12. If the dean and chapter of ——— make a leaſe to a man, his executors and adminiſtrators, for three lives; this ſhall be a deſcendable eſtate, and go to the heir, and not to the executor; *per Cur'*; but the cauſe ended by compromiſe. *St. John's college* and *Theming*, 2 *Vern.* 320.

13. Pictures and glaſſes, tho' generally ſpeaking, part of the perſonal eſtate, yet if put up inſtead of wainſcot, or where otherwiſe wainſcot would have been put, ſhall go to the heir, for the houſe ought not to come to the heir maimed or diſfigured. *Trin.* 1705. *Cave domina* and *Cave bart.* 2 *Vern.* 508.

Vide the caſe of *Beck* and *Rebow*, *Eq. Ca. Abr.* Pt. 2. 4 *Co.* 64. *a.*

(H) *What ſhall be aſſets by diſcent in the hands of the heir.*

1. AN equity of redemption of a mortgage in fee, though not aſſets at law, yet is aſſets in equity; and if aliened or releaſed by the heir, he ſhall be anſwerable for the value. *Paſch.* 1688. *Sawley* and *Gower*, 2 *Vern.* 61.

What ſhall be aſſets, *vide* title *executors and adminiſtrators.*

2. If a man obtains judgment againſt an heir, who has a reverſion in fee deſcended on him, the judgment is only of aſſets, *quando acciderint*, and the creditor cannot by a bill in equity compel the heir to ſell the reverſion; but muſt expect until it falls. *Hil.* 1690. *Fortrey* and *Fortrey*; 2 *Vern.* 134.

(I) *Unreaſonable bargains and ſecurities obtained from young heirs, in what caſes to be ſet aſide. Vide* title *bonds.*

Vide the caſe of *Twiſleton* and *Griffith*, *Eq. Ca. Abr.* Part 2.

1. IF an heir apparent be intitled to an eſtate-tail after the death of his father, which, if in poſſeſſion, is worth 800 *l.* and he is caſt off by his father, and deſtitute of all means of livelihood; and he for 30 *l.* paid him in money, and 20 *l. per ann.* ſecured to be paid him during the joint lives of him and his father, abſolutely conveys his remainder in tail to *J. S.* and his heirs; and the father lives ten years after this conveyance, yet the heir ſhall be relieved againſt this conveyance, although it was abſolute; and though *J. S.* had loſt his money if the heir had died in his father's life-time; *per Nottingham* L. C. *Trin.* 34 *Car.* 2. *Not* and *Hill*, 1 *Vern.* 167, 168. But upon a re-hearing, this decree was reverſed by *North* lord keeper, who ſaid he could not relieve the heir, unleſs it be declared a law in chancery; that no man muſt deal with an heir in his father's life-time; but upon a ſecond re-hearing, this laſt decree was reverſed, and the firſt eſtabliſhed by *Jefferies* L. C. who ſaid, that he took it to be an unrighteous bargain from the beginning, and that nothing which happened afterwards could help it. 2 *Chan. Ca.* 120. S. C. 2 *Vern.* 27. S. C.

2. If one intitled to an eſtate, after the death of two old lives, takes 350 *l.* to ay 700 *l.* when the lives fall, and mortgages the eſtate as a ſecurity; though both the lives die within two years,

yet there shall be no relief (a) against this bargain. *Hil.* 1682. *Batty* and *Loyd*, 1 *Vern.* 141.

(a) *Note*: These hazardous bargains, with heirs or others, are not always set aside in a court of equity, for they may be fair; and it is only upon the circumstance of fraud, or being extreamly unreasonable, that they can be overthrown: but bargains of this kind will be assisted in a court of equity, though there are not sufficient grounds to set them quite aside. *Vide* 1 *Vern.* 271 2 *Chan. Ca.* 136, 137. 2 *Vern.* 15. And *note*, that regularly the party, who comes to be relieved, must restore the money paid, &c. according to that maxim in equity, *he who would have equity done him, must do it to others.* But for this, *vide* where relief has been given against unreasonable bonds obtained from young heirs, title *bonds and obligations*.

CAP. XXXIII.

Of Ideots and Lunaticks.

(A) *Of ideots and lunaticks, who are such, how found, to whose custody to be committed; and here of the power and duty of their committees, and of abuses done them.*

(B) *What acts of ideots and lunaticks are good, void or voidable.*

(A) *Of ideots and lunaticks, who are such, how found, to whose custody to be committed; and here of the power and duty of their committees, and of abuses done them.*

1. THE king by letters patent granted to *A.* the custody of *C. D. Habendum* to *A.* his executors, administrators and assigns, during the ideocy of the said *C. D.* after the death of *A. P.* obtain'd letters patent for the custody of the said ideot: and upon arguing the point, *viz.* whether the custody of an ideot can by law be granted to a man, his executors, administrators

ſtrators and aſſigns, my lord chancellor inclined that it could not; for though it be an advantage and emolument to the king, yet it is coupled with a truſt; and if the grantee ſhould die inteſtate, or make an infant executor, it would be highly inconvenient; and he ſaid there was no precedent of any ſuch grant from the time of the making the ſtatute *de prerogat. regis*, *Mich.* 1681. *Prodgers* and *Phrazier*, 1 *Vern.* 9. 1 *Vern.* 137. S. C. where it is ſaid, that lord keeper *North* refuſed to do any thing in it, till the validity of the patent was determined in a legal way. *Vide* 3 *Mod.* 43. S. C. where in B. R. the grant to the executors was held good; for the king has the ſame intereſt in an ideot that he had in his ward, which always went to the executor of his grantee; but it was otherwiſe of a lunatick.

2. If an inquiſition find that ſuch a one was an ideot for eight years laſt paſt, ſuch an inquiſition is void; for an ideot muſt be found to be ſo *a nativitate*, otherwiſe is not an ideot, but a lunatick only. *Prodgers* and *Phrazier*, 1 *Vern.* 12. *per* Lord Chancellor. *Vide* 3 *Mod.* 43. S. C. in B. R. where this finding was held ſufficient; for the inquiſition finding the party an ideot, the adding eight years was ſuperfluous.

3. A woman was found a lunatick, and the cuſtody of her was committed to a ſtranger; on application made by her ſiſter, to have the cuſtody, ſhe inſiſted, that as ſhe was next of kin, ſo ſhe was the propereſt perſon for that purpoſe; for being intitled to adminiſtration to the lunatick, ſhe would be the more careful of her effects; and the objection to a guardian as next of kin, who may inherit, will not hold in this place, becauſe there is no inheritance. My Lord Chancellor held, that this was not a matter of right, but of prudence, and that he would not remove her from the cuſtody of the ſtranger, nor ever grant the cuſtody of a lunatick to one who ſhould make gain of it; but he ſaid the ſiſter ſhould be called to the yearly account before the maſter. Lady *Cope*'s caſe, 2 *Chan. Ca.* 239.

4. A lunatick, before he became ſuch, made a mortgage of a good part of his eſtate for 50 *l.* afterwards his committee transferred this mortgage, and took up 3 or 400 *l.* more upon it; and my Lord Keeper declared, the mortgage ſhould ſtand a ſecurity for 50*l.* only; and he likewiſe held that the committee of a lunatick has an eſtate but during pleaſure, and therefore cannot make leaſes, nor any ways incumber the lunatick's eſtate, without ſpecial order of this court, where the profits are not ſufficient to maintain the lunatick. And as to improvements and buildings, made by a committee on the lunatick's eſtate, that the heir, upon the lunatick's death, muſt be let into the eſtate, without making any allowance for ſuch improvements. *Mich.* 1684. *Foſter* and *Merchant*, 1 *Vern.* 262.

5. The committees of a lutanick, having inveſted part of the lutanick's perſonal eſtate in a purchaſe of lands, made in the lutanick's name, to him and his heirs; the queſtion was, whether the committees had not exceeded their power, by changing the perſonal eſtate, into a real eſtate, and thereby defeating the next of kin, in favour of the heirs at law. And after great debate, and upon reading the ſtatute made touching the granting of the cuſtody of the lutanick, whereby it is provided, that the ſurplus ſhall be ſafely kept and delivered to him, if he recover; if not, upon his death to be employed for the benefit of his ſoul, *&c.* The court

decreed an account of the perſonal eſtate, and the lands purchaſed to be ſold, and the money to go and be devided as perſonal eſtate amongſt the next of kin. *Mich.* 1690. *Awdley* and *Awdley*, 2 *Vern.* 192.

Prec: in Chan. 203. *Trin.* 1702. S. C. under the name of Mrs. *Aſh's* caſe, ſtates it; Mrs. *A.* who was committed as a lunatick, was forcibly taken away by *P.* and married to him, (for which contempt *P.* was committed) and the marriage controverted in the ſpiritual court; and ſhe was now brought into court to be inſpected, and lord keeper was of opinion ſhe was in her right mind: and the queſtion was, whether ſhe ſhould be diſcharged of the commitment, and left to her huſband, or if ſhe were to be continued under commitment if her huſband ſhould be the committee? lord keeper ſaid, though ſhe is not out of order now, ſhe may be again; the commitment is *Regium munus*, not a prerogative but a duty, and the marriage though good is no *Superſedeas* to it; but he thought ſhe ought not to go back again to the ſame commitment, though he would not now diſcharge her from it: he ſaid, ſuppoſe ſhe did contract when mad, and agreed and conſummated when ſober, it would be good. The reporter adds, that ſir *John Cook* being aſked, if he had known the party ſequeſtred, where the marriage was conſummated, anſwered, yes, often, how elſe ſhall the marriage be controverted. *Ibid.* 204.

6. If a man forcibly takes away a lunatick, whilſt ſhe is under commitment, and marries her, this is ſuch a contempt, for which the court of chancery will commit him, but if the marriage is afterwards held good in the ſpiritual court, (as it may be by being conſummated in one of her lucid intervals) and if upon inſpection it appears, that ſhe is reſtored to her underſtanding, the huſband ſhall be diſcharged, and the commiſſion of lunacy vacated. *Trin.* 1702. Mrs. *Aſher's* caſe.

(B) *What acts of Ideots or Lunaticks are good, void, or voidable.*

1. IF a man who is *non compos mentis* aliens lands, this ſhall not be reſtored to himſelf in chancery, upon a matter of equity, againſt the maxim of the common law. 1 *Roll. Rep. per* lord Chancellor and *J. Dodderidge.* Q.

2. J. S. by inquiſition was the 23 of *June* 1664, found a lunatick, with a retroſpect of 17 years; it was likewiſe found, that he aſſigned a debt ſufficiently ſecured to him for the purchaſe of a certain manor; and on a bill brought in his behalf by the attorney general, juſtice *Tyrril* held, that he ought to be relieved, and of the ſame opinion was my Lord Keeper, on a rehearing; and ſaid, that it was not neceſſary, that the lunatick ſhould be a party, but gave the defendant leave to traverſe the inquiſition. *Mich.* 20 *Car.* 2. *the attorney general on behalf of Smith a lutanick and* Sir *Robert Parkhurſt*, 1 *Chan. Ca.* 113. *Vide* 1 *Chan. Ca.* 153. S. C. cited and there held, that it is neceſſary, that the lunatick ſhould be made a party; *ſecus* of an ideot, and that it was diſpenſed with in the above caſe, becauſe he ſhould not be admitted to ſtultify himſelf.

3. If A. tenant for life, with remaider to his firſt ſon in tail, remainder to *B.* in fee, and *A.* being *non compos*, ſurrenders by deed to *B.* before he has a ſon, this deed of ſurrender is abſolutely void, and the contingent remainder not deſtroyed. *Thomſon* and *Leath*; adjudged in *B. R.* and affirmed on a writ of error in the houſe of lords, *Show. P. C.* 150. 2 *Salk.* 427. S. C. 3 *Lev.* 284. 2 *Salk.* 576. S. C. *vide* 2 *Chan. Ca.* 103. where a conveyance made by a perſon of weak underſtanding was ſet aſide; and 2 *Vern.* 189.

I. Raym. 313. S. C. *Dug.* 351. *Fearns* cont. *Rem.* 233, 241.

4 *A.* obtained a purchaſe at a great undervalue by deeds, fines and recoveries, from one who was a lunatick, and on application of his committee, the purchaſe was ſet aſide. 2 *Vern.* 678. *vide* 2 *Vern.* 414. that a ſettlement made by a lutanick, though not unreaſonable, ſhall be ſet aſide; *vide* 1 *Vern.* 155. where t

court directed that a ſettlement, which was intended to be made by one who was found a lunatick, but it was urged was reſtored to his underſtanding, ſhould be made by fine in *C. B.* that the judges might inſpect and examine him; *vide* 1 *Vern.* 105. that a will made by one who afterwards becomes *non compos*, is not revoked by his being found afterwards a lunatick; and that a bill will not lie to eſtabliſh the teſtimony of the witneſſes to it *in perpetuam rei memoriam.*

* 5. A bill was brought by a lunatick and his committee, to ſet aſide a ſettlement, which had been obtained from him by the defendant, before the iſſuing out of the commiſſion of lunacy; but ſubſequent to the time, wherein by the commiſſion he was found to have been a lunatick; and the bill charged ſeveral acts of inſanity and diſtraction, previous to the making of the ſettlement, and the iſſuing out of the commiſſion; and charged likewiſe that the commiſſion of lunacy was ſtill in force. To this bill the defendants demurred, for that 'twas againſt a known maxim of law, that any perſon ſhould be admitted to ſtultify himſelf, becauſe, during the continuance of the lunacy, he cannot be ſuppoſed to know what he did: But my Lord Chancellor over-ruled the demurrer, and ſaid, that rule was to be underſtood of acts done by the lunatick to the prejudice of others, that he ſhould not be admitted to excuſe himſelf on pretence of lunacy; but not as to acts done by him to the prejudice of himſelf; beſides, here the committee is likewiſe plaintiff, and the ſeveral charges of lunacy are by him, in behalf of the lunatick; and it has been always held, that the defendant muſt anſwer in that caſe; and ſo he was ordered to do here, though the ſettlement was not unreaſonable in it ſelf, being only to limit the eſtate in queſtion to the defendants, the uncles, in caſe of failure of iſſue male of the lunatick, with power for the lunatick to charge the ſame with conſiderable portions for his three daughters, and a power of revocation. *Mich.* 1729. *Ridler* and *Ridler*, at my Lord Chancellor's.

CAP.

CAP. XXXIV.

Infant.

(A) *Infants, how far favoured in equity.*
(B) *How far bound in equity, or less favoured than at law.*
(C) *What acts of infants are good, void or voidable.*

(A) *Infants, how far favoured in equity.*

1. IF a man intrudes upon an infant, he shall receive the profits but as gardian, and the infant shall have an account against him in (a) Chancery, as gardian. 1 *Vern.* 295. *per* Lord Keeper.

(a) The interest of infants is so far regarded and taken care of in this court, that no decree shall be made against an infant, without having a day given him, to shew cause, after he comes of age: An infant may by his *Prochein Amy* call his guardian to an account, even during his minority. If a stranger enters and receives the profits of an infant's estate, he shall, in consideration of this court, be looked upon as a trustee for the infant. *Per Holt* Ch. Just. in his argument of the case of Lord *Falkland* and *Bertie*, 2 *Vern.* 342. this court will decree building leases for sixty years, of infants estates, when it appears to be for their good. 2 *Vern.* 224.

* 2. If a man, during a person's infancy receives the profits of an infant's estate, and continues to do so for several years after the infant comes of age, before any entry is made on him; yet he shall account for the profits throughout, and not during the infancy only. Decreed *Pasch.* 1699. *Yallop* and *Holworthy*.

3. An infant cannot be foreclosed, without a day to shew cause after he comes of age; but the proper way in such a case is to decree the lands to be sold to pay the debts, and that will bind the infant; *per Cur'*. *Booth* and *Rich*, 1 *Vern.* 295. But if there be a mortgage, and it depends upon a disputable title, so that no money can be had by an assignment of it over, equity will not decree an infant to be foreclosed till he comes of age, 2 *Vent.* 351.

Prec. in Chan. 184, 185, S. C. and P.

4. If lands are devised to be sold for payment of debts, the lands may be decreed to be sold without giving the heir, who is

an infant, a day to ſhew cauſe, when he comes of age, for nothing deſcends to him; but if he is decreed to join in the ſale, he muſt have a day after he comes of age. Decreed on a bill of review, *Hil.* 1701. *Cook* and *Parſons*, 2 *Vern.* 429.

5. If an infant puts in an anſwer by guardian, and there is a decree againſt him, without any day given him to ſhew cauſe, ſuch anſwer ſhall not be read, or admitted as evidence againſt him when he comes of age; but if a ſuperannuated defendant puts in an anſwer by his guardian, it ſhall be read againſt him at any time after; for he is ſuppoſed to grow worſe, and is not to have a day to ſhew cauſe. Per lord keeper, *Trin.* 1704. Sir *Richard Leving* and *Lady Caverly*. *Prec. in Chan.* 229. S. C. *accord.*

6. *A.* deviſed lands to truſtees until debts paid, and then to an infant and his heirs, and *J. S.* enters and levies a fine, and five years paſs, and the infant, when of age, brings an ejectment, but is barred, becauſe the truſtees ſhould have entered; yet equity will relieve, and not ſuffer an infant to be barred by the laches of the truſtees, nor to be barred of a truſt eſtate during his infancy; and the infant, in this caſe, ſhall recover the main profits. Decreed *Mich.* 1699. *Allen* and *Sayer*, 2 *Vern.* 368. *Vid. aut.* 3 *Will. Rep.* 309 2 *Equ. Abr.* 517. *pl.* 17

7. A court of equity may, by the approbation of an infant's relations, allot the infant maintenance out of a truſt eſtate, tho' there be no proviſion in the truſt for that purpoſe; and this is founded on natural equity. *Trin.* 1691. *Engleſield* and *Engleſield*, 2 *Vern.* 236.

(B) *Infants, how far bound in equity, or leſs favoured than at law.*

1. INfants have been obliged to anſwer in equity, when the parol ſhould have demurred at law. *Toth.* 108.

2. A ſequeſtration may iſſue againſt an infant. 2 *Chan. Ca.* 163.

3. Infants may be foreclоſed of the equity of redemption. *Vide* 1 *Vern.* 295. 2 *Vent.* 350.

4. If an anceſtor dies indebted by bond, in which the heir is expreſly bound, and leaves no perſonal aſſets, and the lands deſcend on an infant heir, whether equity will, during the minority of the heir, decree ſatisfaction, *Quære*; *& vide* 1 *Vern.* 143. where it is ſaid, that infants may be ſued in equity, and that there is no precedent, that the parol ſhould demur; and 1 *Vern.* 428. where the maſter of the rolls ſaid, that he thought ſuch a decree reaſonable; but the reporter adds a *Dubitatur* to it. That the parol ſhall demur in equity as at law, *Vide. Vin. Abr. Tit. Enfant* (Q) *Ca.* 3, 3 *Will. Rep.* 368. *Gilb. Eq. Rep.* 66.

5. If one gives her ſon other lands in lieu of lands intailed, and by her will gives her intailed lands to her daughter, and takes a bond from her ſon to permit her daughter to enjoy the intailed lands, and the ſon dies, leaving an infant ſon, who being in poſſeſſion of the lands that came in recompence, brings an ejectment for the intailed lands; but by reaſon of the infancy of the grandſon, the bond cannot be ſued; if the daughter brings a bill, ſhe ſhall by decree be quicted in poſſeſſion of the intailed lands until ſix months after the infant comes of age, and then the infant

Infant may ſhew cauſe. *Trin.* 1691. *Thomas* and *Gyles*, 2 *Vern.* 232.

6. If lands are given by will to a woman and the heirs of her body, and it is declared, that if ſhe left no ſons, and only two daughters, the eldeſt ſhould pay the youngeſt 300 l. and have the whole eſtate; if there are two daughters only, and the 300 *l.* is not paid, and the younger brings a bill for an account of profits, and for poſſeſſion of half the eſtate; the court will decree the eldeſt ſiſter, though an infant, to pay the 300 *l.* in ſix months, with intereſt from the mother's death, or in default, to account for profits of a moiety, and the moiety to be ſet out by commiſſioners, and to be held and enjoyed by the younger ſiſter; but the elder, being an infant, muſt have a day to ſhew cauſe when ſhe comes of age. *Hil.* 1704. *Gundry* and *Baynard*, 2 *Vern.* 479.

7. An infant ſhall be bound by conditions in fact, and ſuch conditions as he can perform, in equity as well as in (*a*) law. *Vide Fry* and *Porter's* caſe, 1 *Mod.* 300. 2 *Vern.* 343.

(*a*) An infant is bound by all conditions, charges and penalties in an orignal conveyance, whether he comes to the eſtate by grant or deſcent. 1 *Inſt.* 233. *b.*

8. *A.* gave lottery-tickets amongſt her ſervants, on condition, that if any of them came up a prize of 20l. or more, they ſhould give one half to her daughter; the ticket given the foot-boy, who was an infant, came up 1000*l.* prize; and it was held, that the daughter was well intitled to a moiety; for a gift to an infant, on condition, binds him as well as another perſon. *Trin.* 1706. *Scot* and *Houghton*, 2 *Vern.* 560.

(C) *what acts of infants are good, void or voidable.*

1. IF an infant ſells lands for money, and purchaſes other lands with the money; yet this ſale made by the infant ſhall not be helped in chancery, becauſe the perſon of the infant is diſabled by a maxim in law. 16 *Jac.* 1. *per* Lord Chancellor, *Dodderidge* and *Hutton*, 1 *Rol. Abr.* 376.

2. But if an infant makes an agreement, and receives intereſt under it after he comes of full age, ſuch agreement ſhall be decreed againſt him. *Hil.* 1682. *Franklin* and *Thornebury*, 1 *Vern.* 132.

3. So if an infant makes an exchange of lands, and continues in poſſeſſion after he comes of age, he ſhall be bound by it. 2 *Vern.* 225. *per Curiam.*

4. If *A.* an infant, deſires that lands ſubject to a truſt for payment of younger childrens portions might not be ſold, and offers by his anſwer to ſettle other lands for raiſing the portions; *A.* ſhall be bound by the offer made by him in his anſwer, if the other ſide are thereby delayed; and if the infant *A.* does not immediately after his coming of age apply to the court in order to retract his offer, and amend his anſwer. Decreed, *Cecil* and *The Earl of Saliſbury*, 2 *Vern.* 224.

5. If an infant borrows a ſum of money, for which he gives a bond, and deviſes his perſonal eſtate (being of ſufficient capacity) for the payment of his debts, particularly thoſe he had ſet his hand to, this bond-debt ſhall be paid. Decreed 1651. *Hampſon* and *Lady Sydenham*, *Nel. Chan. rep.* 55.

6. If an infant executor assents to a legacy, such assent (*a*) shall be good, if there are sufficient assets besides to pay debts; *secus* not. *Per* lord keeper *Finch*, 1 *Chan. Ca.* 256.

(*a*) An infant executor, before seventeen years of age, cannot bind himself by his assent to a legacy. 5 *Rep.* 29. *Cro. Eliz.* 719.

7. (*a*) An infant may administer at seventeen; but cannot commit a *devastavit* till he is of (*b*) full age. *per North* lord keeper, 1 *Vern.* 328. (*a*) *Qu. vid.* the latter part of the note here, contra in effect.

(*b*) Where an infant is made executor, administration must be granted *cum Testamento annexo* to his guardian, or next friend, *durante Minoritate*; but the administration ceases when the infant is seventeen years of age (*a*); so if an infant executrix, before seventeen years of age, taketh a husband of full age, the administration presently ceaseth, (*a*) 5 *Rep.* 29. 6 *Rep.* 67. 2 *Inst.* 398. but if an infant is intitled to an administration of the goods of an intestate, administration shall be granted to another till he is twenty-one; because a *minor* cannot enter into a bond, with sureties, to administer faithfully, as required by the 22 & 23 *Car.* 2.

(*a*) This point denied to be law by King C. and Raym. C. J. 3 *Will. Rep*, 88. &c.

8. An infant female may make a will, and dispose of her personal estate at twelve; an infant male at seventeen, or at fifteen if proved to be of discretion; agreed in the case of *Bishop* and *Sharp*, 2 *Vern.* 469. by the civil law at fourteen; and this age is now admitted of in chancery.

9. An infant may be a (*c*) trustee. 2 *Vern.* 561.

(*c*) And by the 7 *Ann. cap.* 19. infants seised or possessed of estates in fee in trust, or in mortgage, are enabled to make conveyances of such estates.

* 10. In this case it was urged, that by the custom of merchants, infants were compellable to account as factors; but the court held, that though an infant may be an executor, and shall be charged, because the law enables him; so he may be charged in trover, because a tort; yet neither on a contract, nor as bailiff, nor for goods to carry on a trade, can he be charged; and therefore when they are made factors, security ought to be taken from their friends, for their accounting. *Trin.* 1700. *Smally* and *mally*.

11. *A.* having married an heiress, who was but eighteen years of age, and she being with child, *A.* petitioned the king, that he would be pleased by *privy seal* to direct his justices of the *common pleas* to take a fine or common recovery, so that the petitioner may be sure of an estate for life in the premises. The king in answer said, that he was satisfied of the petitioner's merit, but referred it to the lord chancellor, to report what was fitting to be done therein; who, upon hearing counsel, declared he thought the petition reasonable, and that he would report the same to the king accordingly. Sir *Humphry Muckworth's* case, 1 *Vern.* 461. Note; *Serj.* Maynard *observed, that the petition was inartificially drawn, in praying, that a fine or common recovery may be taken, for that a fine cannot be taken from an infant, but a* (*d*) *recovery may, by the King's special direction.*

(*d*) An infant, either by himself, or guardian, cannot suffer a common recovery; but if he obtains a privy seal for that purpose he may suffer a recovery. 10 *Rep.* 43. Where such recoveries have been, *vide Hob.* 199. *Cro. Car.* 307. 1 *Rol. Abr.* 731. And *vide* 2 *Salk.* 567. where *J. S.* being of the age of nineteen years, his sister, who was the next in remainder, and also his heir, married one of his footmen, and he petitioned the king for leave to suffer a common recovery, who referred it to the judges of the common pleas, before whom several precedents of recoveries suffered by infants upon privy seals, were cited; but the judges having observed, that seven of the petitions were by fathers, upon the marriage of their sons, and an equal recompence given; and that here was neither father nor marriage in the case; they disallowed it, and said, that this matter had been carried too far already.

CAP. XXXV.

Injunction.

(A) *Injunctions, in what caſes, and when to be granted.*
(B) *What ſhall be a breach thereof.*

(A) *Injunctions, in what caſes and when to be granted.*

1. A Truſtee having contracted to ſell an eſtate to one perſon and the *Ceſtui que* having actually ſold it to another, who moved for an (*a*) injunction to quiet him in the poſſeſſion, being diſturbed by the truſtee; it was held by my lord keeper, that an injunction for quieting the poſſeſſion, is only grantable where the plaintiff has been in poſſeſſion for the ſpace of three years before the bill exhibited, upon a title yet undetermined; or in caſe the cauſe hath been heard, and judgment paſſed upon the merits of the cauſe by the court. Lady *Poines's* caſe, 1 *Vern.* 156.

(*a*) Injunctions to ſtay waſte, *vide* title *waſte*; injunctions to ſtay proceedings at law, vide title *courts, and their juriſdiction.* That chancery will not grant an injunction, unleſs a right appears, *vide* 1 *Vern.* 127. 1 *Chan. Ca.* 165. 1 *Vern.* 276, 120. will grant a perpetual injunction, *vide* 2 *Chan. Ca.* 80, 1 *Chan. Ca.* 75, 2 *Chan. Ca.* 165.

2. If a perſon is ſued at law for irregularly ſerving the proceſs of this court, an injunction will be granted to ſtay the proceedings at law, for the irregularity is only puniſhable in this court. 1 *Vern.* 269.

3. An injunction is never to be granted before a bill filed. 4 *Inſt.* 92. *vide* 1 *Vern.* 156. where it is ſaid, that the defendant cannot have an injunction, becauſe he has no bill filed.

4. But where a mortgagee brought a bill to foreclоſe, and pending the ſuit, an advowſon appendant to the mortgaged manor became void; and the mortgagee being hindered from preſenting brought his *Quare Impedit*; and the court granted an injunction on the defendant's application, tho' he had no bill filed. 2 *Vern.* 401.

* 5. So where a cauſe abated by the death of the lady *Gerrard*, and the defendant was her executor, who being ſerved with a copy of the bill of revivor, and my lord keeper's letter, would not appear, being in privilege; and upon motion an injunction was granted, though the cauſe was not revived; and the caſe of *Armſtrong* and *Jackſon* was cited, where, before a demurrer determined, the plaintiff had an injunction on motion. *Trin.* 1700. *The Duke of Hamilton* and *the Earl of Macclesfield.*

* 6. So where the lord *Wharton* had an injunction to quiet him in the poſſeſſion of the mines in queſtion; and upon hearing of the cauſe, an iſſue was directed, to try whether the mines in queſtion were within the plaintiff's or defendant's manor; the iſſue was tried at bar, and found for the plaintiff; then the plaintiff died, and a bill of revivor was brought; and before the time for anſwering was out, or the cauſe revived, the plaintiffs moved for an injunction to ſtay the lord *Wharton*'s working the mines, having affidavits, that ſince the verdict againſt him, he had trebled the number of workmen, and between that and *Candlemas* would work out the mines: and an injuction was granted, though the cauſe was not revived. *Mich.* 1702. *Robinſon* and *Lord Wharton.*

(B) *What ſhall be a breach thereof.*

1. IF there be a ſuit in equity concerning title to a cloſe, and thereupon an order is made, that the defendant ſhall ſuffer the plaintiff to enjoy the cloſe, till, *&c.* and notwithſtanding the defendant, upon a title of common, puts in his cattle; this is no breach of the injunction, for the common was not in queſtion by the bill. *Hil.* 8 *Jac.* 1. *Bent*'s caſe, *Lane* 96.

2. In this caſe, the queſtion was, whether the plaintiff was intitled to relief for meſne profits received by the defendant whilſt a cauſe was pending in this court; and the defendants had an injunction; and my lord keeper held he was not intitled, but from the time of entry; for if the plaintiff entered, he might recover at law, and the injunction did not prevent his entry. *Mich.* 1705. *Tilley & Ux'* and *Bridger & al'* 2 *Vern.* 519.

CAP.

CAP. XXXVI.

Intereſt Money.

(A) *What debt ſhall carry intereſt, and from what time.*
(B) *Where there may be intereſt upon intereſt.*
(C) *Where the intereſt may exceed the penalty.*
(D) *How debts, contracted before the ſtatutes that reſtrain uſury, ſhall carry intereſt.*
(E) *What intereſt a debt contracted in a foreign country ſhall carry here.*

(A) *What debt ſhall carry intereſt, and from what time.*

1. IF *A.* gives a legacy to his grand-daughter an infant, to be paid at ſuch time, and in ſuch manner as his wife, who was his executrix, ſhould think fit and beſt for his grand-daughter; and the executrix lives near twenty yesrs, and dies without paying the legacy; the legacy ſhall be paid with intereſt from the death of *A.* though there was no demand made of it in the life of the executrix. Decreed *Trin.* 1684. *Churchil* and *Lady Speake*, 1 *Vern.* 251 a legacy payable at a certain day, ſhall carry intereſt from the time of payment. 1 *Vern.* 262. but *quære*, whether there muſt not be *a demand*; for,

Prec. in Chan. 161. S. C. and P.

2. Where a legacy was deviſed to *J. S.* to be paid at a certain time, yet it was held, *per* lord keeper, that it ſhould not carry intereſt, but from the time of a demand made; though otherwiſe of a debt. *Paſch.* 1701. *Joliff* and *Crew*, and *vide* 2 *Salk.* 415. where it was held *per Cowper* lord chancellor, that in caſe of a perſon of full age, he ſhall not have intereſt but from the time of demand; *ſecus* of an infant, becauſe laches ſhall not be imputed to him.

2 *Freem.* 174. *accord.*

3. If a mortgage is forfeited, and the mortgagor meets the mortgagee, and ſays to him, *I have money now, I will come and redeem the mortgage*; and the mortgagee replies, that *he would hold the*

mortgaged

mortgaged premises as long as he could, and when he could hold them no longer, let the devil take them if he would. And afterwards the mortgagor goes to the mortgagee's house with money, more than sufficient to redeem the mortgage, and tenders it there; but it does not appear, that the * tender was to the mortgagee, or that he was within; yet a redemption will be decreed, and the mortgagee shall have no interest from the time of the tender, because of his wilfulness. Decreed *Mich.* 15 *Car.* 2. *Manning* and *Burges*, 1 *Chan. Ca.* 29. and a like case said to be, *Peckham* and *Legay*, about a year before.

* But for this *vide* title *Mortgages*, Letter [D].

(B) *Where there may be interest upon interest.*

* 1. J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate; and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest might be made principal; upon which the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself (who was then near of age) signed it; and the account being admitted to be fair, it was held by my Lord Chancellor, that though regularly interest shall not carry interest, yet that in some cases, and upon some circumstances, it would be injustice, if interest should not be made principal; and the rather in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. Decreed *Pasch.* 1699. *The Earl of Chesterfield* and *Lady Cromwell*; and affirmed by my Lord Keeper *Wright*, *Mich* 1701. 3 Bac. Abr. 659. S. C.

2. If a mortgagee assigns over the mortgage, all the money due to the mortgagee for principal and interest being paid by the assignee, the interest shall be accounted principal in the hands of the assignee, but the account between him and the mortgagee shall not conclude the morgagor; neither shall the interest be accounted principal, unless there was a fair and actual assignment, and the money really paid. *Pasch.* 17 *Car.* 2. *Smith* and *Pemberton*, 1 *Chan. Ca.* 67. *vide* 1 *Chan. Ca.* 258. S. P. *per* Lord Keeper, and by him said to be the constant rule in equity; and that there was not a case to contradict it, except that of *Porter* and *Hobart* in Lord *Shaftshury's* time; *vide* 1 *Vern.* 168, 169. S. P. where my Lord Keeper said, that he thought it reasonable that the interest should carry interest with respect to an assignee; and that though it was resolved otherwise in the House of Lords, in the case of *Porter* and *Hobart*; yet it was on account of the particular hardships which attended that case in all its circumstances.

3. If *A.* mortgages for 450*l.* payable at the end of five years, with interest at 5*l. per cent* in the mean time; and about two months before the end of the five years, the mortgagee assigns over the mortgage for 560*l.* being the principal and interest then due; the 560*l.* shall carry interest, tho' the five years were not elapsed, the mortgage being forfeited by the non-payment of interest Decreed April. 169[illegible]. *Gladman* and *Henchman*, 2 *Vern.* 135. *vide* 1 *Chan. Ca.* 258.

Ca. 253. where it was declared by my Lord Chancellor, that it should be a rule, that a mortgagee (the mortgage being forfeited) should have interest for interest; but 2.

(C) *Where the interest may exceed the penalty.*

Vide 3 Bac. Abr. 691, 692. Ante 91, 92.

1. IF one by will or deed subject his lands for the payment of his debts, and there is a debt due by bond, the interest of which hath out-run the penalty, yet it shall not carry interest beyond the penalty; for the design of subjecting the lands was not to increase the debt, but to give a further security; but if the devisee or trustee neglects to pay in a reasonable time, he shall, after such neglect, pay interest beyond the (*a*) penalty; *per Cowper* Lord Chancellor, 1 *Salk.* 154.

(*a*) Though it be the regular practice in equity, as well as at law, that an obligator should not pay more than the penalty of the bond, the obligee having chosen his own security, and made himself judge. *Vide* 1 *Ver.* 342, 2 *Ver.* 509. Yet a Court of Equity will sometimes extend the debt beyond the penalty; as where the obligee has been delayed by injunction; *vide* 1 *Vern.* 350. so if delayed by privilege of parliament; *vide Show. P. C.* 15. but *Note*; a diversity is often taken, where the obligee and where the obligor sues in equity; for in the last case the court will sometimes, upon relieving against the penalty, decree principal and interest, though the interest exceed the penalty, pursuant to that rule, that *He, who would have equity done him, must do it to others.* And this seems to be the reason, why an obligee shall have interest after he has entered up judgment; for though in strictness, it may be accounted his own fault, why he did not take out execution; yet as by the judgment he is entitled to the penalty, it does not seem reasonable that he should be deprived of it, but upon paying him principal, and the interest which incurred as well before as after the entring up of the judgment.

(D) *How debts, contracted before the statutes that restrain usury, shall carry interest.*

1. IF a mortgagee receives interest upon an old mortgage, after the rate of 8*l. per cent.* after such time as the interest is reduced to 6*l. per cent.* by the statute, yet he shall not be obliged to allow or discount the 2*l. per cent.* towards satisfaction of the principal. Decreed *Trin.* 1688. *Walker* and *Penrie*, 2 *Vern.* 78. 2 *Vern.* 145. S. C. where upon a bill of review, *Rawlinson* and *Hutchins*, Lords commissioners, held the decree should be reversed, against Lord *Trevor*; but it seems to be now settled, that the statute of 12 *Ann. cap.* 16. which reduces the interest of money to 5*l. per cent.* has not a retrospect to any debts contracted before, but that they should carry interest according to the interest allowed, or agreement made at the time the debt was contracted.

(E) *What interest a debt contracted in a foreign country shall carry here.*

* 1. JS. contracted a debt in *Ireland*, for which he gave a bond, and coming into *England* he was arrested here for the debt; and having brought a bill for relief, he insisted among other things, that he should not be obliged to pay *Irish* interest, the money being now to be paid here; but the court held, that he must pay *Irish* interest, and that in all cases interest must be paid according

according to the law of the country where the debt was contracted, and not according to that where the debt is ſued for; but held it reaſonable, as the money was now to be paid here, that the plaintiff ſhould have an allowance for the return of it out of *Ireland*, *Trin.* 1702. *The Earl of Dungannon* and *Hackett*, and ſeveral precedents were cited to this purpoſe, as the caſe of *Lane* and *Nichols*, in which *Turkiſh* intereſt was allowed on a contract made there, though both parties had been long in *England*; ſo *Indian* intereſt was allowed on a contract made there, (*a*) *Harvey* and *The Eaſt-India Company*; and a caſe on the earl of *Donegall*'s will, who living in *England* deviſed a rent-charge out of his eſtate in *Ireland*; and it was held that it ſhould be according to the *Engliſh* value, the will being made here.

(*a*) *Vide Ekins* and *Eaſt-India company*, *Eq. Ca. Abr.* Part 2. S. P. decreed.

2. If a debt be contracted in *Ireland*, and a bond given for ſecuring of it in *England*, it ſhall carry *Engliſh* intereſt, *Mich.* 1700. *L. Ranelaugh* and Sir *John Champant*, 2 *Vern.* 395. but *Quære* of this report; for it appears, that Sir *John. Champant* was deputy-receiver to L. *Ranelaugh*, who was vice-treaſurer of *Ireland*; and that he had accepted and paid ſeveral bills drawn on him by my lord from *England*, amounting to a great deal more than the fees and profits of his place; and that my lord ſent him over a bond for the overplus payable there; and it was held, that this bond on a ſuit here, ſhould carry *Iriſh* intereſt.

3. The plaintiff being a merchant, had ſugars due to him in *Nevis* on bond, with intereſt at 10 *l. per cent.* being the common intereſt of the country; he intruſted one J. S. his agent there, to receive thoſe ſugars and to return them hither. J. S. receives the ſugars, but never returns them, but dies, leaving the defendant his executor, againſt whom the plantiff brought his bill; and though it was urged, that J. S. being an attorney, ſhould be excuſed from intereſt, or at moſt ſhould only pay the intereſt this country allows; yet it was held, that the defendant ſhould pay 10 *l. per cent.* intereſt, and that J. S.'s being only agent or attorney, did not excuſe him, becauſe he had miſbehaved himſelf, *Trin.* 1701. *Ellis* and *Loyd*.

CAP.

CAP. XXXVII.

Jointenants, and Tenants in common.

(A) *What shall be a jointenancy, and not a tenancy in common.*

(A) *What shall amount to a severance of the jointenancy.*

(A) *What shall be a jointenancy, and not a tenancy in common.*

1. IF two persons advance a sum of money by way of mortgage, and take the mortgage to themselves jointly, and one of them dies; when the money comes to be paid, the survivor shall not have the whole, but the representative of him who is dead shall have a proportion. Decreed 7 *Car.* 1. *Penny* and *Steward*, 1 *Chan. rep.* 57.

2. But if two take a lease jointly of a farm, the lease shall survive; but the stock on the farm, though occupied jointly, shall not survive; neither shall a stock used in a joint undertaking in the way of trade survive; and therefore not necessary in articles of copartnership to provide against it; *per* lord keeper. *Hil.* 1683. *Jefferies* and *Small*, 1 *Vern.* 217. and *per* lord keeper, where survivorship is to take place, is where two become interested *by way of gift, or the like.* (a) *Vide* 1 *Vern.* 33, 361. whether if two joint purchasers pay share and share alike for a purchase, and one dies, the whole shall survive.

(a) Accordingly it has been decreed, that if *A.* devises the residue of his estate to his two executors, or makes several men executors, the survivor shall carry all. 2 *Chan. Ca.* 64. Though note the lord chancellor's expression, why the survivor shall carry all, *because all the Judges will have it so.* Ibid. 65.

* 3. The commissioners of sewers had sold and conveyed lands to five persons and their heirs, who afterwards, in order to improve and cultivate these lands, entred into articles, whereby they agreed to be equally concerned as to profit and loss, and to advance each of them such a sum, to be laid out in manurance and improvement

improvement of the land; and it was held, that they were tenants in common, and not jointenants, as to the beneficial interest or right in these lands, and that the survivor should not go away with the whole, for then it might happen that some might have paid, or laid out their share of the money; and others, who had laid out nothing, go away with the whole estate. Decreed at the rolls, *Trin.* 1729. *Lake* and *Gibson*: And his honour held, that where two, or more, purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, that this is a jointenancy, that is, a purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other; but where the proportions of the money are not equal, and this appears in the deed it self, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the others, in proportion to the sums advanced by each of them. So if two, or more, make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements, and dies, this shall be a lien on the land, and a trust for the representative of him who advanced it; and that in all other cases of a joint undertaking or partnership, either in trade, or any other dealing, they were to be considered as tenants in common, or the survivors as trustees for those who were dead.

S. C. called Lake & Craddock, &c. 3 Will. Rep. 158.

Doth not this reason seem to prove, that in this case the land should survive, tho' any charges in improvement should be a lien on the land for the heirs of him who laid them out?

4. If a man covenants to stand seised to the use of *A.* for life, and after to two, equally to be divided, and to their heirs and assigns for ever, the inheritance shall be in (*a*) common, as well as the estate for life; and there is no difference where it is to two, equally divided, and where to two, equally to be divided. 2 *Vent.* 365, 366, *vide Show. P. C.* 210. where it is admitted, that there is no difference between *divided* and *to be divided*; and that distinction is now exploded.

(*a*) Copyhold lands were surrendered to the use of *A. B.* and *C.* and their heirs, equally to be divided between them and their heirs respectively; and Gould & Turton Justices held it a tenancy in common, by reason of the apparent intent of the parties; but Holt Ch. Just. held it a jointenancy, and that the word *equally*, imported no more than to have alike; and as to the word *divided*, he held, that did not import a tenancy in common, for their possession must be intire, & pro indiviso; to divide would be to destroy it; and it is strange to create an estate from a word which implies only, what would destroy it. Fisher and Wigge, (*b*) 1 Sal. 391. But the same case being cited *Mic.* 1730. in the case of Stringer and Phillips, was said by counsel to be reversed, according to my Lord Holt's opinion; in which case it was held by the Master of the Rolls, that there was a difference between words which create a tenancy in common in a will and in a conveyance; for that thouh the words, *equally to be divided*, in a will, create a tenancy in common; yet it is not by force of the words *themselves*, but by the intent of the testator, that there should be no survivorship; and he said there were but two ways of creating a tenancy in common by conveyance, viz. either by limiting it to them expresly as tenants in common, or else by limiting a moiety, or a third, or other undivided part, to one; and the other moiety, or third, to another, &c. for if otherwise, though the words, *equally divided*, be used; yet they shall signify only an equal division and proportion of the profits.—"In the last case "cited, is not the covenant, &c. a meer conveyance, and yet those words, in that case "serv'd the tenancy, (that is in case 4.—from Vent and Show,) unless its being a covenant "to an use makes it differ from conveyances which work by transmutation of possession." —*Quer.*

(*b*) 1 Will. Rep. 14. Hil. 1700. *S. C.* in B. R.—L. Raym. 622. S. C.

5. If a man conveys his house and four *farms* to trustees, upon trust that his two sisters might cohabit in the capital house, and equally divide the rents and profits of the four farms betwixt them, and the whole to the survivor of them, this shall be a jointenancy. Decreed *Mich.* 1694. *Clerk* and *Clerk*, 2 *Vern.* 323. for although the words, *equally to be divided between them*, do sometimes in a will make a tenancy in common; yet it is only by way of (*c*) construction.

(*c*) If a man devises lands

to his two ſons and their heirs for ever, and the longer liver of them, to be equally divided between them after his wife's death; this ſhall be a tenancy in common in the ſons; adjudged 3 *Lev.* 373. by three judges againſt one; and that the latter words being in a will ſhall controul the former.

Prec. in Chan. 167. S. C. 1 P. W. 34. S. C. 3 Brown's Parl. caſes 297. ſays, by the opinion of all the judges of *C. B.* the mother and daughter being tenants in common

6. *A.* If deviſes lands to truſtees and their heirs, in truſt that the profits ſhould be equally divided between his wife and daughter, during the wife's life; and after her death he deviſes the ſame to the uſe of his daughter in tail, with remainders over, and the daughter dies during the mother's life; this being a tenancy in common ſhall go to the adminiſtrator of the daughter, during the mother's life, and ſhall not be a reſulting truſt for the benefit of the heir. Decreed *Mich.* 1701. *Phillips* and *Phillips*, 2 *Vern.* 430. *vide* 1 *Vern.* 65, where the words, *equally to be divided*, was decreed a tenancy in common.

during the life of the mother; at the daughter's death her moiety belongs to her executors or adminiſtrators, by the ſtatute of frauds and perjuries. *Ibid.* 168.—1 Will. Rep. 34. S. C. ſays that the daughter was teſtator's heir at law, and that the Maſter of the Rolls held that the mother and daughter were jointenants, and that all ſurvived to the mother. Afterwards on appeal Lord Somers held, that the mother and daughter were tenants in common, and that the daughter's eſtate determining by her death, the remainder-man or reverſioner had a right to that moiety. Afterwards Wright Lord Keeper, upon a rehearing, was of opinion, that an eſtate by implication did ariſe to the mother in the daughter's moiety after her death; but the judges of *C. B.* (on a reference to them) were of opinion, that the mother and daughter were tenants in common, and that the daughter had an eſtate *pur auter vie*, which upon the ſtatute of frauds (which takes away occupancy) ought to go to the daughter's adminiſtratrix, *viz.* the mother, and that the daughter had *not* an eſtate-tail in truſt, for that *mergers are odious in equity*, and never allowed unleſs for ſpecial reaſons. *Ibid.* 40, 41. L. Raymond. 721. S. C.

7. *J. S.* deviſed a term for years, and all her intereſt therein, to her two daughters, they paying yearly to her ſon 25*l.* by quarterly payments, *viz.* each of them 12*l.* 10*s.* yearly, out of the rents of the premiſes, during his life, if the term ſo long continued; and my Lord Chancellor held it clearly to be a tenancy in common, the 25*l.* being to be paid by the two daughters equally in moieties. *Mich.* 1685. *Kew* and *Rouſe*, 1 *Vern.* 353.

8. If *J. S.* directs by will, that 240*l.* ſhall be laid out in the purchaſe of lands, and ſettled on *M.* and the heirs of her body; and if ſhe die without iſſue, then on the children of *E.* which ſhe ſhould leave behind her, and *M.* dies without iſſue, before any purchaſe had, and afterwards the truſteeslay out the money in a purchaſe, and convey the lands to the two children of *E.* and their heirs, who hold it for ſeveral years, and then one of them dies, the ſurvivor ſhall not have the lands. Decreed *Paſch.* 1688. *Saunders* and *Brown*, 2 *Vern.* 46. 3 *Chan. Rep.* 214. S. C. reported contrary, and there ſaid, that if the money had not been inveſted in a purchaſe, it would not ſurvive. *Vide* 2 *Vern.* 556. where it is held, that ſurvivorſhip muſt take place as well in equity as at law.

Vide Carth. 15. S. C. reported cont. to 2 Vern. 46.

9. A man having a mortgage for years makes his will, and thereby deviſes all his perſonal eſtate, of what nature ſoever, to his executors, in truſt for the payment of his debts, and afterwards deviſes the reſidue and overplus of his ſaid perſonal eſtate to his two daughters, equally to be divided between them, and dies; the debts being ſatisfied, the daughters contract with the mortgagor for the purchaſe of the equity of redemption to them and their heirs; one of the daughters deviſes her ſhare and intereſt to the plaintiff, and dies; and it was held that this purchaſe of the equity of redemption and inheritance was a tenancy in common, the mortgage deviſed to the 2 daughters being ſo, and this purchaſe being founded on the ſaid mortgage. Decreed *Paſ.* 11 *Ann.* *Edwards* and *Faſhion*,

Prec. in Chan. 332. S. C. and decree, *per* Maſter of the Rolls.

10. *J. S.* deviſed his leaſehold houſe to his wife for life, and after her death, he deviſed it to *A.* and her three ſons, equally amongſt them; and it was decreed, that they took it as tenants in common, though there was no mention of any diviſion to be made. *Paſch.* 1718. *Warner* and *Hone.*

Prec. in Chan. 491. S. C. and decree. *Gilb. Eq. Rep.* 146. S. C. *in totidem verbis* with *Prec. in Chan.*

*11. One deviſed 100 *l.* to five, equally to be divided between them and the ſurvivors and ſurvivor of them; and if *A.* (one of the five) died before marriage, her ſhare to go over to another perſon; and it was decreed, that they took this 100 *l.* as tenants in common, and that the words, *and the ſurvivors and ſurvivor of them*, to make them jointenants, would be a contradiction to the firſt words, whereby they were made tenants in common, and that they ſhould be conſtrued to extend only to ſuch who were ſurvivors at the death of the teſtator, and therefore inſerted to prevent a lapſe; and this is the ſtronger, by the limitation over of *A*'s ſhare upon a contingency, by which it is plain the teſtator did not intend her to be a jointenant with the reſt; and as the deviſe was to all five, they muſt all take alike; and not *A.* to be tenant in common, and the other four jointenants. *Mich.* 1730. at the *Rolls*, *Stringer* and *Phillips.*

Vid. 2 *Vern.* 323. which ſeems cont' to this caſe, at leaſt if the point here had ſolely turn'd on the contradiction in the firſt words, for there it is admitted that "equally to be divided" &c. only make a tenancy in common in compliance with the teſtator's ſeeming intent, and that this implicative conſtruction is clearly excluded by the expreſs declaration of his intention by the words "and to the ſurvivor or ſurvivors, &c." *Vid.* laſt page, pl. 5. *Vid.* Ld. Bindon v. Earl of Suffolk. 1 Will. Rep. 96—7. 2 Equ. Abr. 535. pl. 3.

(B) *What ſhall amount to a ſeverance of the jointenancy.*

1. THREE perſons being jointly intereſted in the truſt of a term for years, one of them mortgaged his third part; and the queſtion was, whether the jointenancy was ſevered; and though it was admitted to be a ſettled point in chancery, that if one deviſes his lands in fee, and afterwards mortgages them to another in fee, that is but a revocation *pro tanto* only; yet my lord *Cowper* held that this was not like the caſe of a will, in which it may be for the mortgagor's advantage, not to have it conſtrued a revocation; but that in the caſe of a jointenancy, which is a thing *(a)* odious in equity, it would be a diſadvantage to the mortgagor not to have it conſtrued a ſeverance; for if he ſhould die firſt, all muſt go from his repreſentative to the ſurvivor. *Mich.* 8 *Ann. York* and *Stone*, 1 *Salk.* 158.

(a) Jointenancy (of an inheritance) is to be favoured, for the law loves not to divide and multiply tenures. *Per* Holt Ch. Juſt. 1 Salk. 392.

2. The plaintiff's huſband and defendant had enjoyed a church-leaſe in moieties under an agreement, that there ſhould be no benefit of ſurvivorſhip; but upon the laſt renewal the leaſe was taken in both their names, and no expreſs agreement againſt ſurvivorſhip; the plaintiff's huſband falling ſick, by deed aſſigned his moiety of the leaſe to his wife, and by his will deviſed it to her; and there being no proof of the agreement, and the grant to the wife being void, it was decreed, that the will could not ſever the jointenancy. *Mich.* 1700. *Mayſe* and *Gyles*, 2 *Vern.* 385.

Prec. in Chan. 124. S. C. ſtates it thus: one joint tenant of a church leaſe makes a deed of gift of his moiety to his wife as a proviſion for her, and with intent to ſever the jointure, and then dies; this being to the wife, and void in law, and voluntary and without conſideration, equity would not relieve.

3. If *A.* and *B.* are jointenants, and *A.* makes a leaſe for years of his moiety, to commence upon his death, if *B.* ſhall ſo long live; this is a ſeverance of the jointenancy, and the leaſe will bind *B.* if he ſurvives. 2 *Vern.* 323

4. If one jointenant agrees to alien, and doe ſit not, but dies; this will not ſever the jointenancy, nor [illegible] the ſurvivor. 2 *Vern.* 63.

CAP. XXXVIII.

Legacies.

(A) *Of vested or lapsed legacies, being to be paid at a future time or certain age, to which the legatees never arrived.*
(B) *Of a lapsed legacy, by the legatee's dying in the life-time of the testator; and here, in what cases it shall be good, and vest in another person to whom it is limited over.*
(C) *Of specifick and pecuniary legacies, and here of abating and refunding.*
(D) *Of the time of payment of a legacy.*
(E) *To whom to be paid.*
(F) *Where legatees shall have interest and maintenance.*
(G) *Ademption of a legacy.*

Of devises of things personal, to whom, and by what description good, and where it shall be in satisfaction, *vide* title *devise*. Legacies given upon condition, *vide* title *conditions and limitation*; and *vide* title *remainder*, for legacies limited over.

For this head, Vide 3 Bac. Abr. 476, &c. chiefly 478.

(A) *Of vested or lapsed legacies, being to be paid at a future time or certain age, to which the legatees never arrived.*

1. IF a sum of money is bequeathed to one of the age of twenty-one years, or day of marriage, *to be paid to him with interest (a)*, and he dies before either, yet the money shall go to his *executor*. Decreed *per Finch* C. 29 *Car.* 2. *Clobberie's* case, 2 *Vent.* 342. 2 *Chan. Ca.* 155. S. C. by the name of *Lamper* and *Cloberry*. 2 *Salk.* 415. S. C. cited. 2 *Vern.* 199. S. C. cited and says, it was decreed that the *administrator* should have it, but that he should expect for it till *B.* should have been twenty-one; and that this was confirmed on appeal to the house of lords, though lord *Nottingham* for some time doubted if it should not be paid presently; but it was said this was but an invention to encourage *administrators*. 2 *Vent.* 673. S. C. cited as reported in 2 *Vent.* 2 *Vern.* 673.

2 *Freem.* 24. *Trin.* 1677. *Clobberry* and *Lamben* S. C. for this is a present duty though the *solvendum* be *in futuro*, and is not a contingent gift, as it would have been if the words *to be paid with interest* had been omited; and in this case the executor being of full age, shall have it presently——Says nothing of an appeal to the house of lords.

(a) It is a legacy vested *because it carries interest*. *Vid.* Stapleton *and* Cheele, p. 295. pl. 4.

2. But if money is bequeathed to one at his age of twenty-one years and he dies before that age, the money is *(a)* loſt. 2 *Chan. Ca.* 155. 2 *Salk.* 415. S P.

(a) The rule and diſtinction in theſe caſes is a, ree-

able to the civil law, which is, that if a legacy be deviſed to one generally, payable at the age of twenty-one, or any other age, and the legatee dies before that age; yet this is ſuch an intereſt veſted in the legatee, that his executor or adminiſtrator may ſue for and recover it; for it is *debitum in præſenti*, though *ſolvendum in futuro*, the time being annexed to the payment, and not to the legacy itſelf; ſo if the legacy is made to carry intereſt, though the words, *to be paid*, or *payable*, are omitted, it ſhall be an intereſt veſted. But if a legacy be deviſed to one at twenty-one, or if, or when he ſhall attain the age of twenty-one, and the legatee dies before that age, the legacy is lapſed, *Dyer* 59. 1 *Leon.* 177. *Off. Exec.* 347. *Saunb.* 311, 312. *Vide* 2 *Vern.* 436. where my lord keeper *Wright* was of opinion, that there was no foundation for this diſtinction, and that the teſtator's intention was equal in both caſes: but *note*, that was in a caſe wherein the legacy was to ariſe out of the real eſtate; which by the better authorities, ſhall not go to the repreſentative of the legatee, but ſhall ſink in the inheritance, for the benefit of the heir, as much as if it were a portion provided by a marriage ſettlement; for which *vide* title *Heir*, and 2 *Vern.* 91, 617, 508. and 2 *Vent. Pawlet* and *Pawlet*; but when it was to be paid out of the perſonal eſtate, the above diſtinction has been allowed of, as well before as by all the ſubſequent chancellors; and my lord *Cowper* ſaid, that though it was at firſt introduced upon very ſlender reaſons, and probably upon no other, but from a conſtant willingneſs in the civil law, to ſtretch in favour of a particular legatee againſt the reſiduary legatee, who went away with the whole ſurplus of the perſonal eſtate; yet as chancery has now a concurrent juriſdiction with the ſpiritual court in matters of this nature, he thought it highly reaſonable, that there ſhould be a conformity in their reſolutions, that the ſubject might have the ſame meaſure of juſtice in which court ſoever he ſued.

3. If a portion is deviſed to a child, with intereſt, but not to be paid, or payable, until the child attain twenty-one years, or was married; and the child dies under twenty-one years, and unmarried, yet the portion ſhall go to the Adminiſtrator of the infant. *Trin.* 1687. *Collins* and *Metcalf*, 1 *Vern.* 462. decreed. *Gilb. Chan.* 268, 1 *P. Wms.* 783, 2 *P. Wms.* 277, 610, 3 *P. Wms.* 138. 3 *Atk.* 129. *Comrep.* 382, 513.

4. So if a legacy of 50*l.* is deviſed to J. S. when of the age of ſixteen years, and intereſt in the mean time to be paid quarterly; this is a *legacy veſted, becauſe it carries intereſt* (*b*). *Mich.* 1711. *Stapleton* and *Cheele*, 2 *Vern.* 673. decreed. 317, 318. *Stapleton* and *Cheales* S. C. *Skin.* 147. ſeems to be S. C. ——— *Gilb. Eq. Rep.* 76. S. C. *in totidem verbis* with *Prec. in Chan.*

(*b*) *Vide Chalberie's* caſe, *P.* 294. *pl.* 2, *Prec. in Chan.*

5. But if A. deviſes in theſe words, *viz. I give* 100 *l. a-piece to the two children of* J. S. *at the end of ten years after my deceaſe*, and the children die within the ten years; this is a lapſed legacy, and is ſo in all caſes where the time is annexed to the legacy itſelf, and not to the payment of it. *Snell* and *Dee* (*c*), 2 *Salk.* 415. *per Cowper* Ld. Chan. though it was objected, that this differed from the caſe, where a man deviſes 100*l.* to J. S. at his age of twenty-one, becauſe it is a contingency, whether he will attain to that age; but the expiration of the ten years is inevitable.

(*c*) *Trin.* 1735. *Talbot C.* in the caſe of *King* and *Withers*, ſaid that this caſe

weighed but little with him, for 1ſt, he did not think it well reported; and 2dly, the reaſon ſeems idle, for why may not an uncertainty be tranſmiſſible as well as a certainty, tho' perhaps not ſo beneficial. *Ca. in Eq. Temp. Talbot* 124.

*6. So where one being poſſeſſed of a very conſiderable perſonal eſtate, part in *Jamaica*, and part in *England*, and being himſelf reſiding in *Jamaica* made his will, and thereof ſeveral executors, ſome for his eſtate in *Jamaica*, and others reſiding in *England*, for his eſtate here, and amongſt other things deviſed in theſe words, *viz. I give and bequeath to* J. S. *now under the cuſtody of* R. D. *the ſum of* 2000 *l. at the age of twenty-one years to be paid by my executors in* England, and deviſed all the reſt and reſidue of his eſtate to the plaintiff, and died; J. S. having attained his age of eighteen made his will, and thereby deviſed this legacy, and all his eſtate, to the defendant; and Ld. Chan. held this a lapſed legacy, and that it

was a vain endeavour in the defendant's counsel to construe it a present legacy, and therefore vested by the word *Now*, because it was a plain description of the condition of the legatee, *viz.* *Now* under the custody of, &c. for otherwise they must stop at *Now*, which would be playing with the words; and though the word *paid* was made use of, yet it was plainly intended a designation of the persons by whom the legacy was to be paid, *viz.* by his executors in *England*, which was proper, he having two sets of them. *Trin.* 1710. *Onslow* and *South* decreed.

For this head, *Vid.* 3, *Bac. Abr.* 476. &c.

(B) *Of a lapsed legacy, by the legatees dying in the life-time of the testator; and here, in what cases it shall be good, and best in another to whom it is limited over.*

1. A. by will, reciting, that *B.* owed him 400 *l.* gave and bequeathed that 400 *l.* to him, provided he, out of the 400 *l.* paid several sums in the will mentioned, to his wife and children, and the rest and residue he freely and absolutely gave to him, and willed and required the executor to deliver up the security immediately upon his death, and not to claim or meddle with the debt, or any part thereof; but to give such release or discharge as B. his executors or administrators should require or think fit; B. died in the life-time of the testator; and it was held, that the money directed to be paid to the wife and children was well devised; but as to the residue devised to the debtor himself, that it was a lapsed legacy, he dying in the life-time of the testator; although it was admitted, that if the testator had said, *I forgive such a debt*, or, that my executor shall not demand it, or shall release it, that would have been a good discharge of the debt, though the debtor died in the life-time of the testator. *Mich.* 1705. *Elliot* and *Davenport*, 2 *Vern.* 521. decreed.

1 *Will. rep.* 83 S. C. and decree, *per. lord keep.* B. dying in the life of *A.* *the reporter* says, *the master of the rolls* was of another opinion; and *lord keep.* said it was a doubtful case. An appeal was brought from this decree to the house of lords, but before hearing the parties agreed. *Ibid* 86.

* 2. *A.* devised an estate to his wife for her life, and after to the plaintiff, his niece, and her heirs, upon condition, and to the intent that she pay 400*l.* to such person as his wife, by her will in writing, or any other writing, should direct and appoint, and dies; the wife after marries a second husband, and then makes a will in writing, and thereby reciting the power given her by her former husband's will, appoints the 400 *l.* to be paid to her husband, his executors or administrators; and that when he shall have fully received the 400 *l.* he shall pay 100 *l.* out of it to B. 50*l.* to C. and 50*l.* to *D.* and makes her husband her executor, and then goes on, and says, that she has published this her last will and testament in the presence of three witnesses; and the husband subscribed that he does approve of this will; afterwards the husband died before her, and makes her executrix of his will and residuary legatee; then B. and C. die both intestate, and afterwards the wife dies; and the defendants take out administration to her with the will annexed, and also administration to B. and C. and the question was, whether this appointment being made by will, and the appointee dying before the appointor, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee, and my lord keeper held, that if it was a thing purely testamen-

tary

tary, it would be plainly a lasped legacy; but that in this case the 400*l.* was not in its own nature testamentary, but they take as nominees; and it is but the execution of a trust; and decreed the money to be paid. *Mich.* 1700. *Burnet* and *Helgrave*.

3. *E.* made her will, and devised in these words, "I give unto my loving kinsman R. H. the sum of 300*l.* one 100*l.* part whereof, he doth owe me, which I do intend to give to my cousin S. H. his youngest daughter; but my will and desire is, that he will give the said 300*l.* to his daughter S. H. at the time of his death, or sooner, if there be occasion for her better advancement and preferment;" the testatrix, at the making of her will, was in England, and so it fell out, that R. H. died in Ireland, eight days before the death of the testatrix; afterwards S. H. died at the age of sixteen, and unmarried, and the plaintiff was her administrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellor that the words, *I desire*, or *I will*, amount unto an express devise, and that the one hundred pound bond to the testatrix, should be assigned to the plaintiff, and the 200*l.* paid him, with interest from the exhibiting the bill. *Mich.* 1704. *Eacles and England*, 2 *Vern.* 466, 467. Although it was insisted upon, that a benefit was designed R. H. and that he was not a bare trustee, for he was to have the interest of the 300*l.* for his life, unless his daughter had occasion for it before his death, which she had not.

Prec. in Chan, 200. Trin. 1702. Eacles & England S. C. —And said per Master of the Rolls, that words of recommendation or desire in a will are always expounded as a devise. 1 Atk. 469. 1 Vez. 107. Brown's Rep. 142. 179. 180. 489. 1 Bwm. Ec. Law, (tit Bishops)

4. But where *A.* devised to his sister 350*l.* upon condition that she, at or before her death, should give to her children 200*l.* thereof, and the sister died in the life-time of the testator; and it was held, that the whole 350*l.* was lapsed; for it being a devise of money, the absolute property vested in the first legatee. *Mich.* 1689. *Birkhead* and *Coward*, 2 *Vern.* 116. ruled on demurrer.

2 Freem. 107. Birkhead and Coward S. C. says, that the devise was thus: "I give to my sister H. 300l. upon condition that she give security to leave 100l. a-piece to her two children, and 50l. a-piece to A. and B." H. died before the testator, and per Cur', the legacy is clearly lost, for it was to vest in H. first, and she was to secure the like sum to the children.

5. If *A.* devises 1500*l.* a-piece to the four children of *J. S.* by name, to the sons to be paid at the age of twenty-one years, and to the daughters at eighteen; or days of marriage; and in case one or more of the aforesaid children shall happen to die before his, her or their respective legacy or legacies shall become due, then such legacy or legacies shall go to the survivors of them; and in case three should die, then the survivor to take the whole; if one of the children dies in the life-time of the testator, the survivors shall take that share, and it shall not be a lasped legacy. *Hill.* 1690. *Miller* and *Warren*, 2 *Vern.* 207. decreed. 2 *Vern.* 611. S. P. decreed in the case of *Ledsome* and *Hickman*.

6. So where a legacy of 50*l.* was given to *A.* at twenty-one or marriage, and 50*l.* to *B.* at twenty-one or marriage; and in the close of the will, the testator added, if any legatee dies before his legacy is payable, the same shall go to the brothers and sisters of such legatee; *A.* dying in the life-time of the testator, it was adjudged no lasped legacy, but that it should go to the brothers and sisters. *Trin.* 1700 *Darrel* and *Molesworth*, 2 *Vern.* 378. 2 *Vern.* 653. and 744. S. P. decreed. 1 *Vern* 425. S. P. 2 *Chan. rep.* 187. S. P. *Northey* and *Burbage*, *Hil.* 1617. S. P. decreed.—1671.

Vide 3 Will. Rep. 114, 115. 2 Keb. 12, 2. Eq. C. ab. 545, l. 22. 572, pl. 2.

7. So

Prec. in Chan. 39, S. C. in eodidem verbis.

7. So where a man deviſed 100*l.* to *A.* and *B.* the two daughters of his brother *G.* to be paid within a year after the death of his wife, *viz.* 50*l.* to *A.* and 50*l.* to *B.* if they ſhall both be alive at the time of payment; but if either of them ſhall die before, then the ſaid 100*l.* to the ſurvivor of the ſaid two daughters; one of the ſaid two daughters died in the life-time of the teſtator; and the only queſtion was, whether the ſurviving daughter ſhould have the whole 100*l.* or only the 50*l.* and *Rawlinſon* and *Hutchins*, Lords Commiſſioners, were clearly of opinion, that ſhe ſhould have the whole 100*l.* they ſaid, that by the firſt clauſe of the will, it is a joint deviſe to them of the 100*l.* in which caſe, if the will had gone no further, if one had died, it would have ſurvived to the other; then the *viz.* that comes after is only a ſeverance of it, in caſe they ſhould both live to the time of payment, which they did not; and then the laſt clauſe of the will, incaſe either died before the time of payment, is a new ſubſtantive deviſe of the whole 100*l.* to the ſurvivor; and decreed accordingly. *Mich.* 1691. *Scolding* and *Green.*

Vide for this head, 3 Bac. Abr. 482, &c.

(C) *Of ſpecifick and pecuniary legacies, and here of abating and refunding.*

Prec. in Chan. 392.

1. IF *A.* by will deviſes to his wife all his perſonal eſtate at a place called *W.* and deviſes to *B.* a legacy of 500*l.* and ſeveral other legacies, and aſſets prove deficient to pay the 500*l.* and other legacies; yet the wife's legacy being a ſpecifick legacy ſhall take place. *Mich.* 1714. *Sayer* and *Sayer*, 2 *Vern.* 688. that a ſpecifick legatee ſhall not abate in proportion with a pecuniary one, *vide* 2 *Vern.* 111. *Nelſ. Chan. Rep.* 303. 2 *Chan. Ca.* 25, 171, 1 *Vern.* 31. 2 *Salk.* 416.

* 2 *J. S.* having 4000*l.* ſecured to him by bond, in the names of *A.* and *B.* in truſt for himſelf, deviſed it to his daughter (now married to the plaintiff) and made her reſiduary legatee; and by the ſame will deviſed a leaſe he had in a farm to *R. D.* and there not appearing aſſets at his death to pay his debts, this farm deviſed to *R. D.* was ſold for payment of debts; afterwards, by decree of this court, the 4000*l.* was adjudged to be aſſets to pay debts, and was brought into court, there to remain for that purpoſe; the plaintiff propoſed to have what remained of the 4000*l.* paid out of court to him, all debts being (as was ſaid) paid; and the defendant *R. D.* oppoſed it, till he had firſt had ſatisfaction out of it, for the value of the farm deviſed to him, and ſold for payment of debts. The court held, that the deviſe of this ſum of money was a ſpecifick legacy, and therefore *R. D.* can have but a proportionable part of the value of his ſpecifick legacy out of it. *Mich.* 1700. Lord Caſtleton and Lord Fanſhaw.

3. If a man deviſes a ſpecifick legacy, and likewiſe other legacies, tho' the other legacies fall ſhort, yet the legatee muſt have his ſpecifick legacy intire; but if a man deviſes ſeveral legacies, as 100*l.* to one, and 50*l.* to another, &c. there, altho' he directs the legacy of 100*l.* to be paid in the firſt place, yet if the other legacies fall ſhort, then the legatee of the 100*l.* muſt make a proportionable abatement

abatement of his legacy. *Hil.* 1681. *Brown* and *Alleyn*, 1 *Vern.* 31. 2 *Chan. Rep.* 138. S. P.

4. A creditor shall make legatees refund, when assets become deficient, tho' there be no provision made for refunding. 1 *Vern.* 94. 2 *Vent.* 360. S. P. 2 *Vern.* 205. S. P.

5. So where *A.* being indebted to *B.* made *C.* his executor, and *C.* wasted the estate and died, having devised several legacies, and made *D.* executor, which legacies *D.* paid; and *B.* having exhibited a bill against *D.* the executor of *C.* for his debt due from the first testator, and against the legatees in the will of *C.* to compel them to refund their legacies, there not being sufficient assets of the first testator; and it was decreed accordingly. 1 *Vern.* 162. 'That a creditor shall follow the assets in equity, into whose hands soever they come.' *Vide* 2 *Vern.* 205.

6. One legatee shall compel another to refund where the assets become deficient, tho' there be no provision made for refunding *(a)*; 1 *Vern.* 94. but if the executor is solvent, and he voluntarily paid the legacy, the unsatisfied legatee may come upon him, and oblige him to pay it out of his own purse. 1 *Chan. Rep.* 133. 2 *Chan. Ca.* 132. and therefore the executor is always to be made a party to the suit. 1 *Chan. Ca.* 136, 248. 2 *Vent.* 360.

(a) 2 Will. Rep. 495. S. P. If the defect of assets arises by the wasting of the executor, in such case the legatee who has recovered his legacy shall not be compelled to refund, but shall retain the advantage of his legal diligence. Ibid. 495.

7. If an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice at the time of payment of the legacies, he by a bill in equity may compel the legatees to refund, 1 *Chan. Ca.* 136. if he had been compelled by a decree in equity to pay the legacies, he may make the legatees refund. 2 *Vern.* 205. *per Cur'.*

8. But if an executor voluntarily pays a legacy, or assents to the devise thereof, he cannot, either in favour of other legatees or creditors, compel the legatee to refund. 2 *Vern.* 205. 2 *Chan. Ca.* 9. 2 *Chan. Rep.* 248. 2 *Chan. Ca.* 145, 1 *Vern.* 90, 453, 460. But for this *vide* tit. *executors and administrators*, letter (A).

(D) *Of the time of payment of a legacy.*

1. IF a legacy is given to a child, payable at twenty-one, and the child dies before, tho' his administrator shall have the legacy, yet he must wait for it till such time as the child, if he had lived, would have come to twenty-one; 2 *Vern.* 199. but if it had been payable to the infant with interest, Q.

2. But if a legacy is devised to *J. S.* to be paid at twenty-three years of age, and if he die before, to go over to *A.* and *B.* and *J. S.* dies an infant, the legacy shall be paid presently. *Hil.* 1692, *Passworth* and *Moor*, 2 *Vern.* 283. devised.

3. *A.* by will gives a legacy to *B.* at twenty-one, and if he died before twenty-one, then to the plaintiff; *B.* dies before twenty-one; and the only question was, whether the plaintiff was intitled to the legacy presently, or must wait till *B.* if he had lived, would have been twenty-one; and on time taken to consider of it, *King* C. was of opinion, the plaintiff was intitled to the legacy presently; but where a legacy is given to one to be paid at twenty-one, so as to be an interest vested in him presently, tho' not payable till twenty-one; if the party dies before that age, his

2 Will Rep. 478. S. C. where it is said, that the rule in equity seems by this resolution to be settled accordingly. 2 Equ. Abr. 561. pl. 9, S. C. more at large.

his executors or adminiſtrators ſhall not have it till the legatee, if he had lived, would have been twenty-one years of age, *Trin.* 1728. *Laundy* and *Williams.* Decreed at my lord chancellor's.

4. A legacy of 500 *l.* was given to the defendant's teſtator when he ſhould be 24 years old; the plaintiff being his ſiſter, and executrix to the teſtator that gave the legacy, paid the legatee 250 *l.* of it at twenty-one, to put him out into the world, and gave him a bond, to pay him the other 250 *l.* at a day certain, which was the very day he would attain his age of 24 years: he died before that age. To a bill to have the 250 *l.* repaid, and the bond delivered up, the defendant pleaded the payment, and the bond which was for payment at a certain day, and became a duty thereby; and upon debate, the plea was ordered to ſtand for an anſwer, the lord chancellor declaring it was fit to be heard on the merits. *Mich.* 1687. *Luke* and *Alderne*, 2 *Vern.* 31.

Vide for this head 3 *Bac. Abr.* 484. &c.

(E) *To whom to be paid.*

1. IF a legacy of 125 *l.* is deviſed to an infant, who is but ten years old, and at that age paid by the executor to the infant's father for his benefit; and the father afterwards becomes inſolvent, yet the executor ſhall not be obliged to pay it over again; but if the executor took ſecurity to be indemnified, then he paid it at his own peril, and ſhall pay it over again. *Hil.* 26 & 27 *Car.* 2, *Holloway* and *Collins*, 1 *Chan. Ca.* 245, *but this matter ſeems well ſettled by the following, as well as ſeveral other reſolutions.*

Gilb. Eq. Rep. 103. *Dawley* and *Ballfrey* S. C. *in totidem verbis.* 1 *Will. Rep.* 285, *Mich.* 1715, *Dagley* and *Tolferry* S. C. and *decree affirmed* on appeal. *Note*; this caſe was thought hard, and the more ſo, it being proved that the *teſtator on his death-bed gave directions that the executor ſhould pay the legacy to the father, that he might improve the money for the infant's benefit. Note alſo*, that this particular circumſtance *(omitted in Gilb. Rep.)* appears in the regiſter-book, and from whence it alſo appears that this caſe is rightly ſtated by Mr. *P. Williams*, and that *great ſtreſs was laid on this circumſtance* in the petition of appeal. *Ibid.* 286.

2. A legacy of 100 *l.* was deviſed to an infant of about ten years of age; the executor paid this legacy to the father, and took his receipt for it; when the infant came of age, the father told him he had ſuch a legacy of his in his hands, but could not pay it immediately: but however would not have him trouble the executor about it, for that he would give it him: Upon this the ſon reſted ſatisfied for about 14 or 15 years, and he and his father carried on a joint trade together, and then became bankrupts. And upon a commiſſion taken out againſt the ſon, this legacy of 100 *l.* was aſſigned amongſt other things for the benefit of his creditors, and the plaintiff, the aſſignee of the commiſſion, brought this bill againſt the executor, to have an account, and payment of the legacy; and for the defendant it was inſiſted, that this would be an extream hardſhip on him, if he ſhould be obliged to pay it over again; that he had already fairly and honeſtly paid it to the father, whilſt he was in good circumſtances. And if application had been made ſooner, he might have had his recompence over againſt the father; that the father was by nature guardian to his children, and ſuch payments to him have formerly been allowed good; though now indeed this court has thought fit to extend their care farther for ſuch children, and diſallowed ſuch payments; but the circumſtances of this caſe were ſuch, that the defendant, it was hoped, would not be anſwerable again for it. My lord chancellor ſaid, that if the father had not made his ſon ſuch promiſe of recompence, *and the ſon had acquieſced all that time (a)*, the caſe might have been more doubtful; but this promiſe of his father drew him to forbear applying

(a) In *Gilb. Rep.* 103, it is ſaid, *and the ſon had required the money in time.*

plying to the executor ſooner; and ſince his father had not, nor could now make good his promiſe, being a bankrupt likewiſe, the reaſon of the ſon's forbearance was at an end; and he thought the rule of this court, in not ſuffering parents to receive their children's legacies, was founded on very good reaſon; and therefore, leſt this caſe might hereafter be cited as a precedent, when the circumſtances attending it were forgotten; and to diſcountenance, and deter others from paying ſuch legacies to the parents (tho' he did not deny the hardſhips of this particular caſe) he decreed againſt the executor; which was affirmed on a rehearing. *Mich.* 1715. *Doyley* and *Tollferry*

3. If a legacy be bequeathed to a feme covert, payment of it to her alone is not good, and the executor ſhall pay it over again to the huſband. 1 *Vern.* 261.

(F) *Where legatees ſhall have intereſt and maintenance.*

1. LEgatees exhibit a bill againſt the executor, and by their guardian pray, that he may be obliged to allow them maintenance; to which the executor demurred, becauſe the legatees were under age, and their legacies not payable till they were 21 years of age; but the demurrer was over-ruled. *Mich.* 16 *Car.* 2. *Renneſey* and *Parrot*, 1 *Chan. Ca.* 60.

Where a legacy ſhall carry intereſt, and from what time, vide title intereſt money, letter (A).

2. If a father deviſes legacies or portions to his daughters or younger children, to be paid or payable at their reſpective ages of 21 years, or any other time certain, without making any proviſion for their maintenance in the mean time, and die; in this caſe *they ſhall have intereſt for their portions from his death, till paid, becauſe the father was obliged to have provided for them if he had lived;* but if ſuch portions had been deviſed to them by *a ſtranger*, to be paid or payable at ſuch an age, their legacies ſhould not carry intereſt in the mean time; becauſe he being a ſtranger, was under no ſuch obligation to provide for them. *Trin.* 1712: *The Attorney General* and *Thompſon.*

Prec. in Chan. 337. S. C. and P. agreed per court and counſel. Gilb. Chan. 275. 2 Vent. 346. 2 P. Wms. 21. 3 Atk. 101. 716. Brown's rep. 387.

* 3. A father by his will gave 2000l. a-piece to his two daughters, payable at twenty-one, and charged on land and perſonal eſtate; and the perſonal eſtate being exhauſted in debts, my lord chancellor held, they ſhould have a reaſonable maintenance out of the real eſtate, until their legacies became payable, and allowed them 80 *l. per annum* each. *Trin.* 1729. *Conway* and *Longville.*

Qu. If the ſurplus (above the intereſt) of their maintance money ſhould not afterwards be deducted out of their principal money. Tho' on reflection it appears that as they had 2000l. each, the intereſt was more than their maintenance money, and therefore this objection vaniſhes.

(G) *Ademption of a legacy*

Vide for this head 3 Bac. Abr. 470.

1. A. Deviſed to is daughter 200 *l. Item*, I give to her my houſhold goods, if ſhe ſhall not be married in my lifetime, and afterwards in his life he gives with his daughter in marriage above 200 *l.* and dies, not having revoked or altered his will; and the court held, that the legacy was extinguiſhed by the portion. *Mich.* 1689, *Jenkins* and *Powell*, 2 *Vern.* 114. *Vide* 1 *Chan. Ca.* 301. 1 *Vern.* 95.

2. The

Gilb. eq. rep. 82. S. C. and decree; but lord keeper gave no costs. —Vide the following case of Ford and Fleming.

2. The defendant's late husband made his will in writing, and thereby among other things deviſes as followeth; viz. I give and deviſe to A. my good and only uncle, the ſum of 500*l.* that is to ſay, that bond and judgment he gave me for 400*l.* and 100*l.* in money; and makes the defendant his executrix, and deſires her to be kind and aſſiſting to his uncle, that he might live as became a gentleman: The uncle ſome time after ſold an eſtate, and with the money paid off 320*l.* and took up the bond, and had the judgment vacated, and gave a new bond for the remaining 80*l.* and ſome time after the teſtator died; and the uncle having notice of this will, brought this bill for this legacy of 500*l.* The defendant inſiſted, that this was a ſpecifick legacy of that particular bond and judgment; and they being cancelled and altered before the teſtator's death, was an ademption of the legacy, as to ſo much; and beſides they urged, that this payment of the 320*l.* amounted to a releaſe of ſo much of the legacy, and therefore the plaintiff would have no right but to the remaining 100*l.* On the other ſide it was inſiſted, that the diverſity is where the money is voluntarily paid in by the perſon who owes it, and where the teſtator ſues for and recovers it. In the firſt caſe the legacy continues ſtill good, becauſe the money comes only home to the perſonal eſtate; but in the other caſe, the teſtator by ſuing for it ſhews that he intended to make it his own, and therefore would not leave it to the legatee to recover; and the juſtice of the uncle ought not to prevent the affection of the nephew; and no alteration of his intention appeared. Lord Keeper was clear of the ſame opinion; and decreed the 80*l.* bond to be delivered up, and the reſidue of the legacy to be paid. *Hil.* 1711. Orme and Smith, 2 *Vern.* 681. S. C.

1 Will. rep. 469. S. C. ſays, it was held by lord Chan. that the teſtator receiving the debt himſelf, tho' upon his ſuing for it, was no Ademption of the legacy.

3. One by will deviſed thus; *Item*, I give and bequeath to my grand-daughter Mary Ford (the plaintiff) the ſum of 40*l.* being part of a debt due and owing to me for rent from G. M. ſhe allowing what charges ſhall be expended in getting in the ſame. Item, I give and bequeath unto my grandſons A. and B. the reſt and reſidue of what is due and owing to me from the ſaid G. M. which is about 40*l.* more, to be equally divided between them, they allowing charges as aforeſaid; after the teſtator received the whole debt owing for rent from G. M. For the plaintiff it was inſiſted, that there was a difference between a ſpecifick and a pecuniary legacy, that tho' the diſpoſing of a ſpecifick legacy might be an ademption of it, yet this being a pecuniary legacy, the paying the money to the teſtator would be no loſs of it. On the other ſide was inſiſted upon the difference between a voluntary and compulſory payment; that tho' the firſt was no ademption, yet the ſecond was, and that the teſtator obliged G. M. to pay in the money. But my lord Chan. was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulſory payment, for the latter might be with an intent to ſecure the legacy on all events; and decreed the plaintiff the 40*l.* legacy. *Trin.* 1728. Fortl. and Fleming. Vide 1 *Roll.* 614. *Moor* 789. *Raym.* 335. *Swinb.* part 7. ſect. 20. *Went.* 64.

Quære, If this difference in the books is not well founded. In caſe of a deviſe of a debt due from the deviſee, as the teſtator by ſuing for it could not intend to make it more certain to the legatee than it was when in his own hands: as ſuppoſe (in caſe 2. above) the teſtator had ſued for the 320*l.* inſtead of the uncle's (the legatee) voluntary payment, then it ſeems a juſt diſpute to be an ademption of the legacy, at leaſt *pro tanto*.

CAP

CAP. XXXIX.

Limitation of Suits and Demands.

(A) *What rights, actions or demands, are deemed out of the ſtatute of limitations in equity, and where ſuch rights, actions or demands, tho' once barred, may be revived, or ſet up again.*
(B) *Length of time, how far regarded in equity.*

(A) *What rights, actions or demands, are deemed out of the ſtatute of limitations in equity, and where ſuch rights, actions or demands, tho' once barred, may be revived and ſet up again.*

1. A Truſt is not within the *(a)* ſtatute of limitations. *March* 129. 2 *Will. rep.* 145, S. P. *per* the Maſter of the Rolls.

(a) By the 21 Jac. 1 cap. 16. all actions upon the caſe, other than for ſlander, actions of account, (other than what concerns merchandize between merchant and merchant) actions of treſpaſs, *Quare Clauſum Fregit*, debt upon lending or contract without ſpecialty or arrearages of rent, for detinue, trover, replevin, ſhall be commenced within ſix years after the cauſe of action, and not after. But the right of infants, feme coverts, *non compos mentis*, perſons impriſoned, or beyond ſea, is ſaved; ſo that they commence their ſuit within the time above limited, after their impediments removed: provided that if in any ſuch actions judgment is given for the plantiff, and the ſame is reverſed for error; or if a verdict paſs for him, and upon motion in arreſt of judgment, it is given againſt him; or if the defendant is outlawed in the ſuit and does after reverſe the outlawry; in theſe caſes the plaintiff, his heirs, *&c.* may commence a new action within a year, and not after; by 4 & 5 *Ann. cap.* 16. the plantiff's right is as much ſaved, when the defendant is beyond ſea, as if he were ſo himſelf; provided he brings his action within ſuch time after his return, as is limited by the 21 *Jac.* 1

2. The plaintiff, who was ſon and executor of C. J. *Heath*, who was made C. J. at *Oxon* during the difference between the king and parliament, (but never ſat at *Weſtminſter-Hall*) exhibited a bill againſt the defendants, prothonotaries of the K. B. at that time, to have an account of the money, &c. received by them during that time, by an implied truſt *virtute officii*; to which the defendants pleaded

pleaded the ſtatute of limitations; but upon argument the plea was over-ruled, 15 *Car.* 2. Sir Edward Heath and Henly *& al'*, 1 *Cha. Ca.* 21. 3 *Chan. Rep.* 8 S. C.

3. So where the plaintiff exhibited a bill, to have an account of money received by the defendant from his father (whoſe executor he was) who gave it to him to compound for his eſtate, ſequeſtered for delinquency at Goldſmiths-Hall; and it was ordered accordingly; the court declared it a truſt, and therefore not within the ſtatute of limitations. *Mich.* 15 *Car.* 2 *Sheldon* and *Weldman*, 2 *Chan. Ca.* 26.

2 Freem. 156 S. C. and decreed accord'; but ſays, the bill was diſmiſſed for another reaſon.

4. So where my lady Hollis lent 100*l.* and in the note which was given for it, mention was made, that it ſhould be diſpoſed of as my lady ſhall direct; and a bill being exhibited for it, the court held it a *depoſitum*, or truſt, and decreed payment of it, though otherwiſe it was barred by the ſtatute of limitations. 2 *Vent.* 345.

5. A charity is not barred by length of time, or within the ſtatute of limitations. 2 *Vern.* 392.

6. A legacy is not within the ſtatute of limitations. 1 *Vern.* 256.

7. The ſtatute of limitations is no plea in bar to (*a*) an account. *Paſch.* 1687. *Scudmore* and *White*, 1 *Vern* 456.

(*a*) Accounts current or open are not within the ſtatute of limitations; but accounts ſtated between merchant and merchant are barred by the ſtatute. 1 *Vent.* 89, 90. 2 *Saund.* 124.

8. If a man recovers a judgment or ſentence in France for money due to him, the debt muſt be conſidered here only as a debt by ſimple contract, and the ſtatute of limitations will run upon it. 2 *Vern.* 540, 541. per *Cur'*.

9. A bill was exhibited to be relieved touching a rent charged upon lands by will; the defendant pleaded the ſtatute of limitations, and that there had been no demand or payment in forty years; and the court held, that the caſe in * *Coke's Reports*, on the ſtatute *Hen.* 8. concerned only cuſtomary rents between lord and tenant, and not any rent which commenced by grant, or whereof the commencement could be ſhewn. *Trin.* 1691. *Collins* and *Goodal*, 2 *Vern.* 235.

* 4 *Co.* 10, 11.

10. If one receives the profits of an infant's eſtate, and ſix years after his coming of age he brings a bill for an account, the ſtatute of limitations is as much a bar to ſuch a ſuit, as if he had brought an action of account at common law; for this receipt of the profits of an infant's eſtate is not ſuch a truſt, as being a creature of the court of equity, the ſtatute ſhall be no bar to; for he might have had his action of account againſt him at law: and therefore no neceſſity to come into this court for the account. For the reaſon why bills for an account are brought here, is from the nature of the demand; and that they may have a diſcovery of books, papers, and the party's oath, for the more eaſy taking of the account, which cannot be ſo well done at law; but if the infant lies by for ſix years after he comes of age, as he is barred of his action of account at law, ſo ſhall he be of his remedy in this court; and there is no ſort of difference in reaſon between the two caſes. *Trin.* 1719. *Lockey* and *Lockey*, *per Curiam*.

Prec. in Chan. 518. S. C. ſays, lord Macclesfield was clearly of this opinion.

11. If

11. If there is no (*a*) executor againſt whom the plaintiff may bring his action, he ſhall not be prejudiced by the ſtatute of limitations, nor ſhall any laches in ſuch caſe be imputed to him. 1 *Vern.* 695.

(*a*) If one brings an action before the expiration of ſix years, and dies before judgment, the ſix years being then expired, this ſhall not prevent his executor. 2 *Salk.* 414, 415. 2 *Salk.* 421. But if an executor ſues upon a promiſſory note to the teſtator, and dies before judgment, and ſix years from the original cauſe of action are actually expired, and the executor of the executor brings a new action in four years after the firſt executor's death, the ſtatute of limitations ſhall be a bar to ſuch action. For tho' the debt does not become irrecoverable by an abatement of the action after the ſix years relapſed by the plaintiff's death, yet the executor ſhould make a recent proſecution, to which the clauſe in the ſtatute, that provides a year after the reverſal of a judgment, &c. may be a good direction; or ſhew, that he came as early as he could, becauſe there was a conteſt about the will or right of adminiſtration; for the ſtatute was made for the benefit of defendants, to free them from actions when their witneſſes were dead, or their vouchers loſt. *Trin.* 5 *Geo.* 2. *Willcox* and *Huggins*, adjudged in *B. R.*

12. If a man ſues in chancery, and pending the ſuit there, the ſtatute of limitations attaches on his demand, and his bill afterwards diſmiſſed, the matter being properly determinable at common law; in ſuch caſe the court will preſerve the plaintiff's right, and will not ſuffer the ſtatute to be pleaded in bar to his demand. 1 *Vern.* 73, 74. But if in ſuch caſe the plaintiff was not ſtayed by the act of the court, as injunction, &c. *Quære & vide* 2 *Chan. Ca.* 217. 1 *Chan. Rep.* 205, 214.

13. If a man deviſes all the reſt and reſidue of his perſonal eſtate, after debts and legacies paid, to *J. S.* and ſeveral of the creditors are barred by the ſtatute of limitations, who notwithſtanding bring actions againſt the executor, and he refuſes to plead the ſtatute of limitations, yet equity will not, in favour to *J. S.* to whom the ſurplus is deviſed, compel the executor to plead the ſtatute. *Mich.* 1699. *Lord Caſtleton* and *Lord Fanſhaw* adjudged.

14. If a man by will or deed ſubject his lands to the payment of his debts, debts barred by the ſtatute of limitations ſhall be paid; for they are debts in equity, and the duty remains; the ſtatute hath not extinguiſhed that, tho' it hath taken away the remedy, 1 *Salk.* 154. 2 *Vern.* 141, S. P.

15. If a man has a debt due to him by note, or a book-debt, and has made no demand of it for ſix years, ſo that he is barred by the ſtatute of limitations; yet if the debtor, or his executor, after the ſix years, puts out an advertiſement in the *Gazette*, or any other news-paper, that all perſons who have any debts owing to them, may apply to ſuch a place, and that they ſhall be paid; this (tho' general, and therefore might be intended of legal ſubſiſting debts only) yet amounts to ſuch an acknowledgement of that debt which was barred, as will revive the right, and bring it out of the ſtatute again. *Paſch.* 1714. *Andrews* and *Brown* decreed.

16. So if after the ſix years the debtor, upon application for that particular debt, acknowledges it, and promiſes payment, this revives the debt, and brings it out of the ſtatute; becauſe, the note it ſelf was at firſt but an evidence of the debt, ſo that being barred, this acknowledgement and promiſe is a new evidence of the debt; and being proved, will maintain an *Aſſumpſit* for recovery of it. *Paſch.* 1714. *Andrews* and *Brown per*

(B) *Length of Time, how far regarded in Equity*

1. IF a perſon has enjoyed an eſtate twenty-five years, though he cannot prove that livery and ſeiſin was made of it, yet he ſhall not be moleſted; for equity, after ſuch length of time will preſume livery. *Toth.* 54. 1 *Vern.* 196.

2. So if a perſon is in poſſeſſion of a copyhold eſtate for years under a will, though he cannot prove that there was any ſurrender to the uſe of that will, yet equity will ſupply that defect after ſuch length of time. 1 *Vern.* 195. 2 *Chan. Ca.* 150 S. C.

3. The plaintiff exhibited a bill to ſet aſide a conveyance made by his father twenty years ago, and alledged, that at the time his father was *non compos*; but the court diſmiſſed the bill and ſaid, that after twenty years it was not proper to examine whether a perſon was *non compos*, or not. 1 *Chan. Rep.* 40.

4. The plaintiff exhibited a bill againſt the executors of a purchaſer of certain lands from him, to have 500*l.* part of the purchaſe-money paid, which was decreed to be paid him thirty three years before; but the executors having pleaded, that the plaintiff and defendant lived near each other, and that no ſuit was commenced againſt the teſtator in his life-time, tho' the plaintiff might have eaſily done it, the court held the plea good. 2 *Chan. Rep.* 44.

5. So where a bond of twenty-two years old came to the hands of an executor; and in as much as the obligee, till about ſeven or eight years paſt, lived near the teſtator, and never demanded any intereſt, the court conceived the bond was ſatisfied, and ordered it to be cancelled. 1 *Chan. Rep.* 78. *Vid.* *Chan. Rep.* 88. S. P. 1 *Chan. Rep.* 106.

6. *A.* exhibited a bill to have a ſpecifick performance of a covenant, whereby the plaintiff was to have a pit in the defendant's ground for digging of *black ſtones*, and that when the one failed, he might ſink a new one, and that there ſhould be no other pit for digging *black ſtone*; but it appearing that the defendant, and thoſe under whom he claimed, had been in poſſeſſion of a pit there above *ſixty* years, the bill was diſmiſſed. *Hil.* 1690. *Scolefield* and *Whitehead*, 2 *Vern.* 12[illegible]

7. A common which has been incloſed for thirty years, ſhall not afterwards be thrown open. 1 *Vern.* 32.

8. The defendant held a copyhold of the manor of *Ip*[illegible] at the rent of 8*s. per ann.* and ſo it appeared by the court-rolls of *Hen.* 8. of *Phil.* and *Mary*, and down to *Car.* 1. and in the 1 *Car.* 1. the defendant's mother was admitted, as of the manor of *Ipeing*. The owner of the manor of *Dean*, which he purchaſed from *J. S.* who formerly was owner of both manors, brought his bill to compel payment of the 8*s. per ann.* and although he admitted that the copyhold was held of the manor of *Ipeing*, but not of the manor of *Dean*: yet the rent having been paid to him for near twenty years, which was the only evidence he had to ſhew for it, the arrears and growing rent were decreed to him, and a trial at law denied, tho' prayed by the defendant. *Mich.* 1705. *Steward* and *Bridger*, 2 *Vern.* 516, 517.

9. *A.* deviſes his eſtate to *B.* his ſon, charged with 500*l.* to his granddaughter, the daughter of *B.* payable at twenty-one, or marriage; *B.* on the marriage of his daughter, gives her 1500*l.* portion, but no notice is taken of the 500*l.* legacy, nor any releaſe given for it; twenty years afterwards, the daughter and her ſecond huſband bring a bill againſt the father for the 500*l.* and the bill was diſmiſſed, for the 1500*l.* ſhall be preſumed a ſatisfaction, eſpecially after ſuch a length of time. 2 *Vern.* 484. A legacy preſumed to be paid after a great length of time. 2 *Vern.* 21.

CAP. XL.

Maſter and Servant.

(A) *What Remedy they have againſt each other.*
(B) *How far anſwerable for each other to others.*

(A) *What Remedy they have againſt each other.*

1. A BILL was exhibited to be relieved againſt an apprentice-bond and articles, and to have them up; and upon hearing, it was ordered, that the defendant do, within a certain time, *viz.* one year, bring his action, and go to trial thereupon for his damages; or in default thereof, the bond and articles to be delivered up; and the reaſon given was, that if it were in the defendant's choice to ſtay his action as long as he pleaſed, he would ſtay till the plaintiff's witneſſes were dead; and this practice of putting the maſter to ſue, or to deliver up the indentures, was ſaid to be uſual. *Hil.* 17 & 18 *Car. Baker* and *Shelbury*, 1 *Chan. Ca.* 70.

2 *Freem.* 184. S. C. and P. *Semble in auters caſes* for witneſſes may die. *Ibid.*

2. *A.* put his ſon apprentice to an apothecary, and gave with him a ſum of money, and allowed the youth 10*l. per Ann.* for his clothes; the defendant having put away his apprentice, after he had lived ſome time with him, by reaſon of negligence and miſdemeanors laid to his charges, the court decreed the maſter to refund 30*l.* of the money, and the rather, becauſe the indentures were not (*a*) inrolled, ſo as the matter was not properly cognizable before the *Chamberlain* of *London*. *Trin.* 1688. *Therman* and *Abell*, 2 *Vern.* 64.

(*a*) That the indentures muſt be inrolled, *vide* 2 *Vern.* 492.

3. *A.* placed his ſon with an attorney at the time he lay ill of the ſickneſs whereof he afterwards died, and gave 120*l.* with him, and articles were executed, by which it was provided, that in caſe the maſter died within one year, that then 60*l.* of the money ſhould be returned; it happened that the maſter died within three weeks after ſealing of the articles and payment of the money; and on a bill brought againſt his executor, the court decreed 100 guineas to be paid back to the father, notwithſtanding the agreement of the parties. *Trin.* 1687. *Newton* and *Rowſe*, 1 *Vern.* 460.

4. If an apprentice marries without the privity of his maſter, yet that will not juſtify his turning him away, but he muſt ſue his covenant. 2 *Vern.* 492.

5. But by the cuſtom of *London*, a freeman may turn away his apprentice for gaming. 2 *Vern.* 291.

6. *A.* gave the defendant *B.* a *Spaniſh* merchant, 600*l.* to take his ſon apprentice, and entred into a bond of 1000*l.* for his fidelity, and at the ſame time took a covenant from his maſter, that he ſhould at leaſt once a month ſee his apprentice make up his caſh; the defendant brought an action on the bond, alledging, that the apprentice had run out 800*l.* and on a bill to be relieved, my lord Keep. held, the meaning of the covenant was, that the defendant ſhould not only ſee to the caſting up of the caſh, that it was right in figures, but to ſee the caſh effectually made up; and therefore decreed the plaintiff ſhould be anſwerable for no more than the maſter could prove the apprentice imbeziled in the firſt month, when the imbezilment began. *Mich.* 1705. *Montague* and *Tidcombe*, 2 *Vern.* 518.

(B) *How far anſwerable for each other to others.*

1. *A.* As maſter of a ſhip, of which the defendants were part-owners, bought ſeveral goods of the plaintiffs, as beef, biſket, ſails, &c. *A.* failed, and on a bill to compel the defendants to pay, they inſiſted that *A.* only was liable, becauſe he had money from the part-owners to pay the plaintiffs; but the court held, that the maſter was but a ſervant to the owners, and where a ſervant buys, the maſter is (*a*) liable; and though the owners paid their ſervant, yet if he paid not the creditors, they muſt ſtand liable, and therefore decreed the owners to pay the plaintiffs their debts in proportion to their reſpective ſhares and intereſts in the ſhip. *Hil.* 1709. *Speering* and *Degrave*. 2 *Vern.* 643.

(*a*) Whatſoever comes within the compaſs of a ſervant's buſineſs, the maſter ſhall be chargeable therewith, as of his command, and ſhall likewiſe have advantage of the ſame againſt others; but if a ſervant borrows money in his maſter's name, or takes it up of a creditor of his maſter's without order, that does not bind the maſter. *Noy's Max.* 93, 94. *Dr. & Stud. Dial.* 2. *cap.* 42.

2 *Vern.* 146. S. C.

2. The plaintiff *Graham* was *privy purſe* to King *James* the ſecond, and alſo maſter of his *buck-hounds*; the defendant *Stampe* was a *laceman*, and by his friends made intereſt to the plaintiff, that he might be made uſe of to furniſh lace, &c. for the king's hunt, and was employed accordingly, and *Graham* did likewiſe deal with him on his own private account, and he was from time to time paid for what he furniſhed for the king's liveries, &c. out of the privy purſe; but on king *James*'s going away,

away, the defendant brought an *indebitat. Aſſump.* againſt *Graham*, as well for what he had furniſhed for the king's uſe, as for what he had furniſhed for *Graham*'s own particular uſe, and recovered for both; and on a bill brought to be relieved, the circumſtances of the caſe appeared to be, that *Stamper* had been permitted to furniſh lace and fringes, *&c.* for the king, on his deſire and application made to *Graham*, on his behalf; that the entries in the day-book of ſuch goods as were delivered for the king's uſe, was without price, that they may be added in the ledger-book, higher or lower, as they had a proſpect of ſooner or later payment; that the defendant from time to time had been paid out of the king's privy purſe; and one witneſs ſwore, that he ſaid he expected payment from the privy purſe, and not elſewhere; that the account of the goods delivered to the king's uſe had been paid off to about ten months, but the account of goods delivered on *Graham*'s private ſcore, was of four years continuance, which ſhews that he kept them as diſtinct accounts; that none of the goods delivered for the king's uſe came to *Graham*, nor was there any particular promiſe to pay for any of them; and the court held, that if the law ſhould be, that he that ſpeaks for, or fetches goods for his maſter without any particular promiſe of paying for them, is liable to pay for them, (which they ſeemed to doubt): yet on theſe circumſtances the plaintiff was intitled to relief, and accordingly ordered, that the defendant ſhould only take out execution for ſo much as the plaintiff was indebted to him on his account. *Trin.* 1692. *Graham* and *Stamper*.

CAP.

CAP. XLI.

Mortgages.

(A) *Of the Nature and different Kinds of Mortgages; and herein of the Power of Equity in ſupplying Defects in favour of the Mortgagee, and in making that a Mortgage which otherwiſe would be an abſolute Conveyance.*

(B) *Of the Equity of Redemption, at what Time.*

(C) *Of the Perſons to redeem.*

(D) *Of Foreclosure; and here of Opening the Foreclosure; Parties foreclosed, and Tender and Refuſal of the Mortgage Money.*

(E) *Where there are ſeveral Mortgagees of the ſame Eſtate; what Remedy they have againſt the Mortgagor, and againſt each other.*

(F) *Where a Mortgagee may protect himſelf by Buying in precedent Incumbrances.*

(G) *Where a Perſon who comes to redeem muſt do Equity to the Mortgagee before he will be admitted.*

(H) *Mortgage-Money, to whom to be paid.*

(I) *Mortgagee anſwerable for the Profits, and how to account.*

(K) *How the Aſſignee of the Mortgagee is to account.*

(A) *Of the Nature and different Kinds of Mortgages; and herein of the Power of Equity in ſupplying Defects in favour of the Mortgagee, and in making that a Mortgage which otherwiſe would be an abſolute Conveyance.*

1. A *Mortgage* is the ſame thing as the *Hypotheca* of the (a) Civilians, and may be defined a pledging of lands, or other

(a) The civil law diſtinguiſhed between the *Pignus* and *Hypotheca*; the *Pignus* was when any thing was obliged for money lent, and the poſſeſſion paſſed to the creditor; the *Hypotheca* was when the thing was obliged for money lent, and the poſſeſſion remained with

other immoveable thing, for money lent in such manner, that the profit or *Usufructus* of the thing pledged remains with the debtor till such time as default is made in payment of the money at the time appointed.

with the debtor: and in case of goods pignorated, the creditor was

obliged to the same diligence in keeping them, as he used about his own; so that if the goods were lost by the negligence of the creditor, an action lay; for the property being transferred to the creditor for a particular purpose, he was to keep them at his peril: if the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; or if the money was not paid, the creditor had his *Actio Pignoritia* or *Hypothecaria*; but if the money was tendered or paid to the creditor, the contract of pignoration was dissolved, and the debtor might have the pledge back as a thing lent; *Justin. Vin.* 592. and this seems to have introduced the notion among us of the debtor's right of redemption.

2. There were no mortgages of lands whilst the ancient feudal tenures continued, because the feud was filled with a tenant from the lord's original bounty; but when a liberty of alienation was given, two manner of ways of mortgaging were made use of, which *Littleton* distinguishes between, and calls by the names of *vadium vivum* and *vadium mortuum*. *Co. Lit.* 205.

3. The *vadium vivum* is where a man borrows 100*l.* of another, and makes an estate of lands to him, till he hath received the said sum of the issues and profits of the lands; and it is called *vadium vivum*, because neither the money nor the land dieth; for the lands are constantly paying of the money, and they are not left as a dead pledge, in case the money be not paid; and this seems to have been the most ancient way of pledging. *Lit.* sect. 205.

4. The *vadium mortuum* is so called, because it is doubtful whether the feoffor will pay the money at the day limited, or not; and if he do not pay, the land which is but in pledge, upon condition for the payment of the money, is taken from him for ever, and so dead to him; and if he do not pay it, then the pledge is dead to the tenant of the land. The ancient way of making those mortgages was by a charter of feoffment on condition, that if the feoffor, or his heirs, paid the sum to the feoffee, or his heirs, he should re-enter and re-possess, and sometimes the condition was contained in the charter of feoffment, and sometimes it was defeasanced by another charter made at the same time. *Litt.* 332. *Maddox* 318.

5. These sort of conveyances were subject to these inconveniences, that if the money were not paid at the day, the estate became absolute, and was subject to the dower of the wife of the feoffee, and all other his real charges and incumbrances, though he were afterwards permitted to perform the condition. *Co. Lit.* 221. *Cro. Car.* 190.

6. But the courts of equity have set this matter right, and have maintained the right of redemption, not only against tenant in dower, and the persons that come under the feoffee, but even against tenant by the *Curtesy* and the lord by *Escheat*, that come in the *post*; because the payment of the money doth, in consideration of equity, put the feoffor in *statu quo*, since the lands were originally only a pledge for the money lent. *Hard.* 465, 469. *Vid.* 2 *Bac. Abr.* 128.

7. If tenant in tail demises lands for ninety-nine years by way of mortgage, under a condition of redemption, and on his marriage suffers a recovery, and in consideration of the portion settled a jointure, and then borrows more money of the mortgagee, and appoints the term as a security, the recovery inures to make good

good the term; and if the mortgagee had no notice of the jointure, he ſhall be allowed the ſecond money lent as well as the firſt. 1 *Chan. Ca.* 119, 120.

8. If a copyholder in fee ſurrenders to the uſe of the mortgagee in fee, and the copyholder becomes a bankrupt before preſentment, and there is no preſentment; yet *per Cowper* lord Chan. though the ſurrender was void in law for want of a preſentment, and that might be the laches of the mortgagee in not procuring of it, yet the ſurrender was a *lien*, and that bound the land in equity; and the aſſignee under the commiſſion of bankruptcy ought not to be in a better caſe than the bankrupt, who was plainly bound in equity by this defective conveyance. *Mich.* 8 *Ann. Taylor* and *Wheeler*, 2 *Salk.* 449.

* 9. The plaintiff lent a ſum of money on the mortgage of ſome houſes, and had a bond for payment of the money, as uſual in ſuch caſes; afterwards he lent a farther ſum of 2000*l.* on the equity of redemption, and had a bond for that likewiſe; afterwards the mortgagor becomes a bankrupt, and by ſome accident the value of the houſes ſunk ſo much, that they were not ſufficient to raiſe the mortgage-money firſt lent; and on a bill brought to have them ſold, and that as to ſo much as they fell ſhort to anſwer the firſt mortgage-money, the mortgagee might come in upon his bond as a creditor; it was ſo decreed, and as to the 2000*l.* lent upon the equity, which was worth nothing, it muſt ſtand ſingly upon the bond. *Paſch.* 1695. *Wiſeman* and *Carbonell.*

10. *A.* lends money to *B.* to carry on certain buildings, and takes a mortgage from him to ſecure 16000*l.* with intereſt, and by another deed executed at the ſame time, takes a covenant from *B.* that he ſhould convey to him, if he thought fit, ground-rents to the value of 1600*l.* at the rate of twenty years purchaſe; and on a bill brought to redeem, the maſter of the rolls decreed a redemption, on payment of principal, intereſt and coſts, without regard to that agreement, but ſet aſide the ſame as unconſcionable; for a man ſhall not have intereſt for his money, and a collateral advantage beſides for the loan of it, or clog the redemption with any by-agreement. *Mich.* 1705. *Jennings* and *Ward*, 2 *Vern.* 520.

11. If the condition of a mortgage is, that the mortgagor ſhould redeem during his life, or that the mortgagor, and the heirs of his body, ſhould redeem; yet equity will admit the general heir of ſuch mortgagor to a redemption, becauſe there can be no purchaſe, ſince there is a clauſe of redemption; and when the land was originally only a pledge for money, if the principal and intereſt be offered, the land is free; and it would be very hard, that it ſhould be in the power of the ſcrivener, or griping uſurer, by ſuch impertinent reſtrictions, to elude the juſtice of the court. 1 *Vern.* 33, 190. S. C. 2 *Chan. Ca.* 147. S. C.

12. But if a man borrows money of his brother, and agrees to make him a mortgage, and that if he has no iſſue male, his brother ſhould have the land; ſuch an agreement made out by proof, may well be decreed in equity. 1 *Vern.* 193. *North* lord Keeper.

13. *A.* in conſideration of 1000*l.* made an abſolute conveyance to *B.* of the reverſion of certain lands after two lives, which

2 *Freem.* 67. S. C. *and decree*, ſays, it was thought hard by ſeveral at the bar that the *heir* ſhould be permitted to redeem againſt the preſs agreement of his anceſtor. *Ibid.* 69.

t that time were worth little more; and by another deed of the same date, the lands are made redeemable any time during the life of the grantor only, on payment of the 1000*l.* and interest; *A.* died not having paid the money; and it was held by my lord *Nottingham*, that his heir might redeem, notwithstanding this restrictive clause; and that it was a rule, *once a mortgage and always a mortgage*, and that *B.* might have compelled *A.* to redeem in his life-time, or have foreclosed him; but on a rehearing, lord Keep. *North* reversed the decree on the circumstances of this case; for it appeared, by proof, that *A.* had a kindness for *B.* and that he had married his kinswoman, which made it in the nature of a marriage-settlement; he likewise held that *B.* could not have compelled *A.* to redeem during his life; which made it the more strong. 33 *Car.* 2. *Newcomb* and *Bonham.* 1 *Vern.* 7, 214. S. C. 232. S. C. 2 *Vent.* 364. S. C. where it is said, that lord *North*'s decree was affirmed in the house of lords. *Vide* 1 *Vern.* 268.

14. If *A.* mortgages land to *B.* worth 15*l. per ann.* for securing 200*l.* and at the same time *B.* enters into a bond, conditioned, that if the 200*l.* and interest is not paid within a year, then he to pay to *A.* his executors or administrators, the further sum of 78*l.* in full for the purchase of the premisses, &c. and *A.* dies within the year, and the money is paid the next day after the mortgage is forfeited to his administrator; yet *A.*'s heir may redeem, paying the 200*l.* and likewise the 78*l.* that was paid the administrator. *Mich.* 1687. *Willet* and *Winnel*, 1 *Vern.* 488. decreed.

15. So where *A.* for 550*l.* made an absolute assignment of a church-lease for three lives to *B.* and *B.* by writing under his hand agreed, that if *A.* paid 600*l.* at the end of the year, *B.* would reconvey; *B.* died, leaving *C.* his son and heir; two of the lives died, and the lease was twice renewed by *C.* and his father; and tho' it was near twenty years since the conveyance was made, yet the master of the rolls decreed a redemption on payment of the 550*l.* and the two fines, &c. *Mich.* 1688. *Manwe* and *Ball*, 2 *Vern.* 84. *vide* 1 *Vern.* 183, 394. where a mortgagee was allowed to redeem before the time agreed on.

(B) *Of the Equity of Redemption, at what Time.*

1. AT a re-hearing before my lord Keep. assisted with justice *Vaughan* and *Turner*, concerning the redemption of a mortgage which had been made above forty years, my lord Keep. declared that he would not relieve mortgages after twenty years, for that the statutes of limitations did adjudge it reasonable to limit the time of one's entry to that number of years, unless there are such particular circumstances as may vary the ordinary case, as infants, Femes covert, &c. who are provided for by the very statute, though those matters in equity are to be (a) governed by the course of the court; and that it is best to square

(a) Though there is no time limited for redemption of mortgages; yet where a man comes in at an old hand, it hath been sometimes decreed, that the possessor should account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles; but the common doctrine in the courts of equity is, that mortgages are not within the statute of limitations, though that statute is mentioned sometimes as a proper direction to go by; for the courts of equity are tender of settling any

any ſet time, becauſe a man can never be

ſquare the rules of equity as near the rules of reaſon and law as may be. *Ewre* and *White*, 2 *Vent.* 340.

injured if he receives principal, intereſt and coſts; but the proprietor of the land is injured if he parts with his poſſeſſion under the true value; but ſometimes the court hath allowed length of time to be pleaded in bar, where the mortgaged eſtate hath deſcended as a fee, without entry or claim from the mortgagor, and where the poſſeſſor would be intangled in a long account. *Vide.* 1 *Chan. Ca.* 102. 1 *Chan. Rep.* 97, 98, 184, 206.

2. A bill was exhibited to redeem a mortgage; to which the defendant demurred, becauſe by the plaintiff's own ſhewing, it appeared the mortgage was ſixty years old; but upon argument the demurrer was over-ruled, becauſe it was charged in the bill, that the mortgagor agreed the mortgagee ſhould enter, and hold till he was ſatisfied; which is in the nature of a *Welſh* mortgage; and in ſuch caſe the length of time is no objection. *Mich.* 1686, *Orde* and *Herning*, 1 *Vern.* 418.

Prec. in Chan. 116. S. C.

3. So where a bill was exhibited to redeem a mortgage made in 1642. though the mortgagee entered in 1650, and there were three deſcents on the defendant's part, and four on the part of the plaintiff; yet the length of time being anſwered for the greateſt part by infancy or coverture; and for as much as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up by the mortgagee, the court decreed a redemption, and an account from the foot of the account in 1686. *Trin.* 1700. *Procter* and *Cowper*, 2 *Vern.* 377.

4. But where a mortgage was made to *A.* in the year 1639 to indemnify him againſt debts, for which he was engaged for the mortgagor, and in the year 1649, he entered into the mortgaged premiſſes, and had poſſeſſion, and afterwards conveyed away ſeveral parts of the mortgaged premiſſes to ſeveral perſons, and ſeveral ſales and marriage-ſettlements had been made of them. In the year 1663, a bill was brought to redeem, but all the aſſignees were not parties; and a decree to an account and a report made, and exceptions taken to that report; and ſo it reſted for about eighteen years, and then another bill was brought, and another decree to redeem, but no proſecution upon it from the year 1676 till 1697, and then the plaintiff having purchaſed the equity of redemption of thoſe lands (*inter alia*) from the heirs of the mortgagor, brought his bill to redeem; the objections againſt it were the length of time, the many derivative titles that had been made, and when no ſuit was depending, and the difficulty of taking the account; to which it was anſwered, that there had been freſh purſuits, and that the difficulty of the account had been occaſioned by the mortgagees themſelves, and that there were infants in the caſe. My lord Keep. held, there ought to be no redemption, and that length of time excuſes the mortgagee for taking the eſtate for his own, and uſing it accordingly; and none that have come in under him have done amiſs; and though there were infants in the caſe, yet the time having begun upon the anceſtor, it ſhall run even upon infants, as it is at law in the caſe of a fine; and there is one great objection to a redemption in this caſe, that it does not appear that the plaintiff paid any thing for this equity of redemption, only had it thrown into his bargain. *Hil.* 1700. *St. John* and *Turner*, 2 *Vern.* 478. S. C.

* 5. The

5. The plaintiff's grandfather in the year 1686, had made ortgage of the eſtate in queſtion, which proved to be about or ten pounds *per annum*, for ſecuring 100*l.* in the year , this mortgage was aſſigned over to the defendant, who greement was then let into poſſeſſion, and had continued ſo ſince, and was now about ninety years of age; the mort- r died ſeveral years ſince, leaving the plaintiff's father, his ſt ſon and heir of full age, who likewiſe died in the year , leaving the plaintiff his eldeſt ſon and heir, then about ve years of age, who brought this bill for an account, and let into a redemption of the eſtate in queſtion, but which defendant had been in poſſeſſion of thirty-three years, and as greatly over-paid his principal and intereſt; but my lord n. diſmiſſed his bill, and ordered it to be entered down, ne of the reaſons for diſmiſſing the bill, that the plain- had no remedy by ejectment at law to recover the eſſion, being barred by the ſtatute of limitations, and he ght that a reaſonable guide for this court to follow, as to edemption in equity; and though the plaintiff was an in- at his father's death, yet the computation of time began before, when there was no infancy in the caſe, and there- will run on againſt infants after. *Mich.* 1729. *Knowles* and *e.*

(C) *Of the Perſons to redeem.*

A Perſon who comes in by a voluntary conveyance may redeem a mortgage. 1 *Vern.* 193. admitted, he who es to redeem a mortgage, muſt ſhew a title. 1 *Vern.* 182.

2. If a man enters into a bond, in which he binds himſelf his heirs, and dies, leaving a real eſtate to deſcend to his ſubject to a mortgage for years, and the heir ſells the ty of redemption; the obligee cannot redeem the mortgage, out firſt having a judgment at law againſt the heir. *Paſch.* . *Bateman* and *Bateman.*

. The mortgagee in fee after forfeiture was attainted, and ing ſeized, and whether the mortgagor ſhould redeem *du- tur. Hard.* 465.

. *A.* mortgaged his lands upon condition, that if he or his s repaid 100*l.* at ſuch a day, he ſhould re-enter; before the he dies, leaving iſſue a daughter, his wife *enſient* with a the daughter pays the money at the day, and then the ſon orn; the daughter ſhall keep the lands, and the ſon ſhall recover againſt her, for the daughter is in nature of a pur- er, where ſhe hath regained the land by her own vigilance, ch otherwiſe had lapſed at law to the mortgagee. *Cro. Car.* 1 *Co.* 99.

Qu. if this point would now be decided in this manner, as in the preſent doctrine of mortgages it is plain the eſtate was in no ſuch danger of forfeiture;

count of the equity of redemption which was a privilege u known at common law.

. If a man deviſes lands which are in mortgage to *A.* for life, ainder to *B.* in fee; *A.* ſhall contribute one third towards diſcharge of the mortgage. 1 *Chan. Ca.* 271. *vide* 2 *Vern.* . and title *Contribution* and *Average*, letter (B).

. If a jointreſs, who is to hold the land free from incum- nces, pays off a precedent mortgage, her executors ſhall hold till they are ſatisfied, becauſe ſuch tenant for life ought to eimburſed the money ſhe paid to ſet her eſtate free, and in the

the condition she ought to have been. 1 *Chan. Ca.* 271. 2 C *Ca.* 100. 1 *Chan. Rep.* 19.

7. But if a jointress after marriage join with her husband a fine, and mortgage the land, and the husband dies, there land is charged, and she shall pay her part towards the disb thening the land; and her executors shall not hold the lands satisfied thereof, because she herself concurred in the laying the charge, and therefore must join in the disburthening of according to the value of her interest. 1 *Chan. Ca.* 271. 2 C *Ca.* 99, 100. 1 *Chan. Rep.* 19.

8. If a man marries a jointress of houses which are bu down, and the husband and wife borrow 1500*l.* to build on ground, and levy a fine *sur concessit* for ninety-nine years, if wife lived so long, and a deed is made between the conu and the husband, wherein the husband covenants to repay mortgage-money with interest, and the equity of redempt is limited to the husband and his heirs; and the husband pends 3 or 4000*l.* in building upon this ground, and dies; wife shall redeem, and not the heir of the husband. creed by *Nottingham* lord Chan. and affirmed on a rehearing *North* lord Keep. *Brend* and *Brend*, 1 *Vern.* 213. for the wife no party to the deed of redemise, by which the redemption limited to the husband; and the wife being a jointress, having granted a term for years only out of her estate for there rests a reversion in her, which naturally attracts the demption.

9. *A.* on his marriage agreed to leave his wife 1000*l.* if survived him; the drawing of the agreement was left to parson of the parish, who made a bond from *A.* to his intend wife in 2000*l.* conditioned to leave her 1000*l.* if she survi him; the marriage was had, and *A.* died, leaving a freeh and a copyhold estate in mortgage, and which were mo gaged together; and it was held, that the wife should rede as well the freehold as copyhold, and hold over till she satisfied. *Hil.* 1704. *Acton* and *Pierce*, 2 *Vern.* 480.

10. *A.* joins with *B.* her husband, in making a mortgage years of her inheritance for 4500*l.* to supply the husband's casions, to pay for the place of captain of the *band* of *pensio* and subject to the mortgage; the estate was settled in *A.* for l remainder to her son in tail. *B.* in the mortgage deed covena to pay the money, and the proviso was, that on payment of mortgage money, the term was to cease; the mortgage was veral times assigned, and particularly in 1683, and the w joined in it; and there the proviso was, that on payment of money by them, or either of them, the mortgage-term was be assigned, as they, or either of them, should direct or a point. A few days after the mortgage was made, *B.* by let thanked his wife for having sealed it, and added, that the p fits of the office should be religiously applied to pay off the cumbrance; but afterwards when money came in, tho' he p off the mortgage, yet he took an assignment thereof in trust himself, and by will devised his personal estate, and the bene of this mortgage, to his second wife; and on a bill by the of the first wife, to have this mortgage assigned him, it w declared by my lord Keep. that he could not decree for hi

upon the usual terms of redemption, on payment of princi- interest and costs, discounting profits; but upon an appeal e lords, the son obtained a decree to have the mortgage ned to him. *Pasch.* 1702. *The Earl* and *Countess of Hunting-* 2 *Vern.* 437.

. So where *A.* and his wife mortgaged the wife's estate, *A.* covenanted to pay the money, but the equity of redemp- was reserved to them and their heirs; the husband dying s decreed, that the mortgage should be discharged out of husband's estate. *Hil.* 107. *Pocock* and *Lee*, 2 *Vern.* 604.

Of Foreclosure; and here of opening the Foreclosure, Parties foreclosed, and Tender and Refusal of the Mort- age Money.

A Mortgagee obtained a decree against a mortgagor and all the creditors whose debts affected the estate, that should redeem, or be foreclosed. One of the creditors the money by the consent of the rest, and has the mort- assigned to him; and agrees with them, that if they would his money at a further day, they should redeem him; wife, that he should have the lands absolutely; and it was on a bill brought by the other creditors, that they should m, tho' the creditor who paid the money had been in pos- n 20 years, and had made great improvements, they al- g only necessary repairs, and lasting improvements. *Hil.* *Exton* and *Greaves*, 1 *Vern.* 138.

There being a first and second mortgage made of the same , the first mortgagee brought a bill against the second, to el him to redeem, or to be foreclosed, and foreclosed him dingly; it so happened that the first mortgagee, by his devised the premisses to the mortgagor; and thereupon the d mortgagee brought a new bill to set aside the first mort- and to be let in to a satisfaction of his money; the defen- pleaded the former suit and decree of foreclosure; but the was over-ruled. *Trin.* 1691. *Cook* and *Sadler*, 2 *Vern.* 235.

. If a mortgagee has a decree of foreclosure, tho' that de- e signed and inrolled, yet if he after brings an action of n the bond given at the same time for payment of the y and performance of the covenants in the mortgage deed, ction opens again the foreclosure, and lets in the equity emption of the mortgagor. *Trin.* 1729. *Dashwood* and *ay*, at the rolls.

A man makes a mortgage, and afterwards makes a mar- settlement of the equity of redemption, wherein he limits he wife, and then on the issue of his body, with remain- tail to his brother; the mortgagee exhibits his bill against ortgagor to have his money, or that he may stand fore- without making the brother a party, and has a accordingly; and afterwards the mortgagor dies with- ue, and the lands remain to the brother by the marriage ent, who prefers his bill to redeem; and it was dismis- or having made those parties to the bill of foreclosure, ere parties to the mortgage, he did as much as was neces- for perhaps it was impossible for him to know all the against whom to seek a foreclosure; and this would keep

him

him an eternal bailiff to the mortgagor; beſides, to open a count after length of time againſt a perſon, who by law obliged to keep no account, in favour of a meer volunte unreaſonable. 1 *Chan. Ca.* 217, 220.

5. Tenant for life, the reverſion in fee; he in reverſion m gages his eſtate in fee, and the mortgagee deviſeth it; the ſee may bring his bill againſt the mortgagor, and need not the heir of the deviſor a party, becauſe he hath no intere the lands at all, it being all deviſed away from him, a need only foreclоſe the mortgagor. 2 *Chan. Ca.* 32.

6. If a man mortgages lands, and then confeſſes ſeveral j ments, and ſome of the perſons that have judgments giv mortgagee notice, and after he obtains againſt the mortga decree to foreclоſe; ſuch perſons, that gave notice of intereſt, ſhall notwithſtanding redeem, becauſe they are ditors for a valuable conſideration, and the mortgagee notice of them, ſo that he might have made them parties bill; but the perſons, that gave no previous notice of judgment, are totally barred of all redemption by the fo decree. 1 *Chan. Rep.* 170, 171.

7. But when a bill was exhibited by a ſecond mortgag redeem, and the firſt mortgagee pleaded his mortgage, a decree to foreclоſe the mortgagor, without notice of the ſ mortgage, yet the plea was over-ruled. *Mich.* 1707. G and *Chadwell*, 2 *Vern.* 601.

(*a*) If upon a mortgage a tender be made of the money at the place appointed for payment, at any time of day ſpecified in the condition, and the mortgagee refuſes, the condition is ſaved for ever, mortgagor need not ſtay at the place appointed till the laſt inſtant of the day; becauſe expreſs letter of the condition, the money is to be paid on the day indefinitely; nor nee be any new tender afterwards within a convenient time, becauſe by the words of the both parties ought to acquieſce; and upon ſuch refuſal the land is diſcharged, becauſe u tender the demiſe is void; and if it be on a feoffment the condition is performed, and t for may re-enter; but the money lent doth yet remain a debt or duty, becauſe it was a the original lending of the money, whether it had been ſo ſecured or not; and tho' the fails according to the words of the agreement, yet there is the ſame natural juſtice money ſhould continue. *Co. Lit.* 209. 5 *Co.* 114. *Plow.* 173.

8. If the mortgagor (*a*) tenders the money, and the gagee refuſes, he loſes the intereſt from the time of the te becauſe it is but a pledge for the money; and if the mon tendered, he ought not to keep the pledge; and no man to pay for the forbearance, when he hath the money *Chan. Ca.* 29. 2 *Chan. Ca.* 206. S. P.

* 9. The plaintiff had made a mortgage in fee of his which by ſeveral meſne aſſignments was come to Sir *W Dodwell*; and there being likewiſe two ſeveral terms for ſtanding out, they were aſſigned to truſtees, in truſt *William Dodwell*, to protect the inheritance, and ſubject ſame equity of redemption; the plaintiff and Sir *Willia well* ſettled an account of what was due; and there a ing to be due theron 4400*l.* principal money, the intere then paid off, and at the ſame time Sir *William Dodwel* a note, whereby he promiſed, that on payment of the 4479*l.* or thereabouts, on the 23d of *October* then next, the intereſt computed to that time, he would re-convey heritance to the plaintiff and his heirs, and would procu truſtees to aſſign the two terms for years, as the plaintiff direct. In *Auguſt* following Sir *William Dodwell* died, defendants were his executors; and he likewiſe left the

ant *Mary*, his only child, and heir at law, an infant of about eight years of age; the plaintiff provided the money, and on the 23d of *October* tendered a bank-bill of 4500*l.* to one of the executors, (there being four in all) for him to take thereout what was then due for principal and intereſt; but the executors having none of them proved the will, he refuſed to accept of the tender; upon which the plaintiff aſked him, if he objected to the legality of the tender, being in a bank-bill, and not in money, and that if he did, he would preſently turn it into money; to which the other anſwered, he had no objection to the tender, but not having proved the will, he would not accept of the money. Afterwards the plaintiff made the like tender to another of the executors, who likewiſe refuſed to accept of it, not having proved the will; but he objected to the legality of the tender, not being in money: afterwards all the four executors proved the will; and the bill was brought to redeem on payment of 4400*l.* and intereſt to the 23d of *October*, being the time mentioned in the note; and that the plaintiff might not be obliged to pay intereſt beyond that time, as the defendant's executors inſiſted he ought: and it was held by my lord Chancellor, that this tender in a bank-note was not, ſtrictly ſpeaking, a legal tender; but ſince it was proved the plaintiff offered to turn it into money, that made it a good tender. *2dly*, It was clearly agreed, that any, or either of the executors, before probate, might have received and given a good diſcharge for the money, eſpecially when, as appeared in this caſe, they afterwards proved the will, and ſo were executors *abinitio*. *3dly*, That tho' they were executors only in truſt for the daughter who was an infant, yet none of them could be in a better caſe than Sir *William Dodwell* himſelf could have been, if he had been living; and ſuch tender under theſe circumſtances would have bound him; ſo it will his executors and deviſee; and therefore decreed a redemption on payment of the 4400*l.* and intereſt to the 23d of *October*, the time mentioned on the note, and no longer, and no coſts on either ſide; and the infant heir at law, on payment of the money to the executors, was to convey the inheritance deſcended to her according to the act 7 *Ann.* for obliging infant truſtees to aſſign and convey. *Hil.* 1729. *Sir John Auſten* and *the executors of Sir William Dodwell*, at my Lord Chancellor's.

(E) *Where*

(E) *Where there are ſeveral Mortgagees of the ſame Eſtate, what Remedy they have againſt the Mortgagor, and againſt each other.*

* 1. IF a man mortgages lands by a defective conveyance, and afterwards mortgages to a ſecond perſon, by an aſſurance, that is good and effectual, with notice, the ſecond ſhall prevail, becauſe that carries the legal title; and equity will not interpoſe, when both are equally upon a valuable conſideration; but if a man mortgages by a defective conveyance, and there are ſubſequent creditors, whoſe debts did not originally affect the land, equity will ſupply ſuch defective conveyance againſt ſuch ſubſequent incumbrances, who acquired a legal title afterwards; for ſince the ſubſequent creditors did not originally take the lands for their ſecurity, nor had in view an intention to affect them, when afterwards the lands are affected, and they come in under the very perſon that is obliged in conſcience to make the defective ſecurity good, they ſtand in his place, and ſhall be poſtponed to ſuch defective conveyance. *Mich.* 1670. *Burgh* and *Francis*, by Sir *Heneage Finch*, lord Keep.

Qu. if not "without notice."

Prec. in Chan. 30. S. C. Qu. if "mortgagor" and "mortgagee" be not tranſpoſed each into the place of the other.

2. The mortgagor being ſon-in-law to the mortgagee, having entered, and afterwards ſuffered the mortgagor to take the profits for ſeveral years, without requiring intereſt; it was held by the court, that the intereſt of the firſt mortgagee ſhould not affect the lands, ſo as to keep out the ſecond mortgagee longer than he would have been, had the intereſt been duly paid: it was likewiſe held, that if a mortgagee, after notice of a ſubſequent mortgage, joins with the mortgagor, in a ſale of the lands to a ſtranger, the money received by either, for the purchaſe, ſhall ſink ſo much of the mortgage money. *Mich.* 169[illegible] *Bentham* and *Haincourt*.

3. If *A.* has a firſt mortgage, and *B.* a ſecond, and ſubject to theſe mortgages, the eſtate is ſettled on *C.* for life, remainder on *D.* an infant; *A.* may bring a bill to foreclоſe, though *B.* has not the like remedy over againſt *D*, who becauſe of his infancy cannot be foreclоſed. *Mich.* 1705. *Draper* and *Jennings*, 2 *Vern.* 518.

4. If a firſt mortgagee brings a bill to foreclоſe the mortgagor, and an account is directed and taken between them, ſuch account ſhall bind the ſecond mortgagee, tho' he was no party to the bill, if there was no fraud or colluſion in the taking of it. *Trin.* 29 *Car.* 2. *Needler* and *Deeble*, 1 *Chan. Ca.* 299.

5. If a man mortgages certain lands to one man, and mortgages thoſe lands, with ſome others to another, though this ſeems to be a caſe omitted out of the ſtatute againſt clandeſtine mortgages; yet if it appears to be a contrivance to evade it, as if an acre or two of land were only added, this will not exempt it; but a perſon who will take advantage of the (*a*) ſtatute, muſt be an honeſt mortgagee, and therefore if a man has uſed any fraud or practice in obtain[illegible]

(*a*) By the 4 & 5 *W. & M. cap.* 16. if any perſon ſhall borrow any money, *&c.* and for the payment thereof ſhall ſuffer a judgment or recognizance, and ſhall afterwards borrow another ſum of another, or for other valuable conſideration, and for ſecuring the repayment and diſcharge thereof

g a ſecond mortgage, he ſhall not have the benefit of the ſta- thereof, ſhall mortgage lands to the ute. 2 *Vern.* 589, 590.

econd lender, or to any other perſon in truſt for him, and ſhall not give notice to the mort- agee of ſuch judgment, &c. in writing before the execution of the ſaid mortgage, ſuch ortgagor ſhall have no benefit in equity of redemption of the lands mortgaged, unleſs ſuch ortgagor, or his heirs, upon notice given by the mortgagee in writing, under hand and ſeal, teſted by two witneſſes, of ſuch former judgment, &c. ſhall within ſix months pay off and iſcharge the ſame, and cauſe the ſame to be vacated and diſcharged. And if any perſon ho ſhall once mortgage lands for valuable conſideration, ſhall again mortgage the ſame ands, or any part thereof, to any other perſon, the former mortgage being in force, and ſhall ot diſcover in writing to the ſecond mortgagee the firſt mortgage, ſuch mortgagor ſhall have o relief, or equity of redemption, againſt the ſecond mortgagee, but ſuch ſecond or third mortgagees may redeem any former mortgage. This Act ſhall not extend to bar any widow f any mortgagor of her dower, who did not legally join with ſuch huſband in ſuch mortgage, r otherwiſe lawfully exclude herſelf.

6. If *A*, being about to lend money to *B.* on a mortgage, ſends *C.* to inquire of *D.* who had a prior mortgage, whether he had any incumbrance on *B.*'s eſtate; and it is proved that *C.* went to him, annd ſpoke to him accordingly, *D.*'s mortgage ſhall be poſtponed. 2 *Vern.* 554. *vide* 2 *Vern.* 370.

7. One *Goff*, being poſſeſſed of the *Thatch'd Houſe* at St. *James's* on a building leaſe for 60 years, mortgages it to Dr. *Lancaſter* and one *Habberfield*, for ſecuring 600 *l.* which the defendant afterwards paid off, and advanced to *Goff* 600 *l.* more, and took an aſſignment of this mortgage, but had not the original leaſe delivered to him till ſome days after the aſſignment. *Goff* afterwards being in a declining way, propoſed to borrow of the plaintiff 350 *l.* on a mortgage of a vault and two rooms, part of the mortgaged premiſſes; and on a treaty for that purpoſe, one *Remington*, who acted for the plaintiff, deſired to ſee the original leaſe. *Goff* told him that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it ſafe to truſt them in his own houſe, where all ſort of company reſorted; upon which *Goff* goes to the defendant, who was an attorney in the city, tells him he was about agreeing with a perſon for the rebuilding part of the premiſſes, at ſo much a foot ſquare, which would better his ſecurity, and deſired him to let him have the original leaſe, that he may ſee the dimenſions of the houſe; the defendant would not truſt him with the leaſe in his own power, but goes along with him to the *Thatched Houſe*; and after he had been there ſome time, *Goff* ſends for the plaintiff and *Remington*, told them he had now the original leaſe, which they might ſee; and upon their coming to his houſe, *Goff* goes into the room where the defendant was, and deſires him to let him have the leaſe, to ſhew the perſon he had mentioned, for that he was now in the houſe; and accordingly the defendant lets him have the leaſe, which he carries to the plaintiff and *Remington*; and they being ſatisfied therewith lend him the money, and took a mortgage of the vault and two rooms, inſiſting at the ſame time to have the original leaſe delivered to them; but *Goff* urging, that it concerned much more than the plaintiff had in mortgage, and that he could not part with it, the plaintiff permitted him to keep it, and he thereupon in about an hour's time delivered it again to the defendant, without acquainting him with what he had done; and the defendant ſwore expreſly in his anſwer, that he had no notice of this tranſaction, or of the plaintiff's mortgage. Afterwards the plaintiff lent *Goff* a farther ſum of money and prevailed on

2 *Vern.* 726. S. C.

Gilb. Eq. Rep. 122. S. C. *in totidem verbis.*

the defendant to let him have the original leaſe a ſecond time; but there was no proof that the defendant knew the occaſion of it, and he by his anſwer expreſsly denied his having notice of it. Afterwards *Goff* failed, and thereupon the defendant brought his ejectment, and recovered; and this bill was brought to have the defendant's mortgage poſtponed, upon pretence that here was a manifeſt fraud on the plaintiff, and that the defendant was privy to it; and at the *Rolls*, the plaintiff had a decree accordingly, but on appeal the decree was reverſed; but my Lord Chan. ſaid, if a man makes a mortgage, and afterwards mortgages the ſame eſtate to another, and the firſt mortgagee is in combination to induce the ſecond mortgagee to lend his money, this fraud without doubt will in equity poſtpone his own mortgage; ſo if ſuch mortgagee ſtands by, and ſees another lending money on the ſame eſtate, without giving him notice of his firſt mortgage, this is ſuch a miſpriſion as ſhall forfeit his priority; but here is no manner of proof that the defendant knew any thing of the plaintiff's lending his money; nay if there had, yet the plaintiff appears guilty of ſo much a groſſer neglect, that he ought not to prevail; for the defendant intruſted *Goff* with his original leaſe but for a very little while; the plaintiff takes his word that he could not part with it, and leaves it wholly in his power, to go on in defrauding whom elſe he had a mind to; beſides, it appears the defendant was impoſed on by *Goff*; for he parted with the leaſe only to better his own ſecurity, and had the moſt ſpecious pretence that could be for it; and therefore it cannot, without manifeſt proof, be objected to him, that he let *Goff* have his leaſe to ſhew the plaintiff, or with a deſign to draw in the plaintiff to lend his money, and diſmiſt the bill with coſts, unleſs the plaintiff ſhould within ſuch a time redeem the defendant; and for precedents were cited *Raw* and *Pott*, the Counteſs of *Bridgwater* and *Ruſſel*, and one *Clare*'s caſe of *Yorkſhire*. *Mich.* 1716. *Pett* and *Ruſſell*.

(F) *Where a Mortgagee may protect himſelf by buying precedent Incumbrances.*

1. IF a man mortgages land to *A.* and afterwards makes a ſubſequent mortgage to *B.* without notice at the time of making the mortgage, and *B.* purchaſes in a precedent mortgage which ſtands out at law, tho' nothing on it be due in equity, or ſtatute, whereon money is due, which he extends, he ſhall hold the land till he is ſatisfied what is due upon both ſecurities, though he had notice of *A.*'s mortgage before his ſecond purchaſe of the prior ſecurity; becauſe having at firſt innocently lent his money he may do what he can to ſecure that money from being loſt; and when he hath purchaſed in the prior incumbrance, he hath title at law, and being equally on a valuable conſideration with the mean incumbrancer, it is but juſt that equity ſhould leave in the ſame manner that it ſtood at law; for there is no room for equity to interpoſe, to take away the ſecurity the law had given where the perſon that has the ſecurity comes into the title without any corruption at all; and it were partiality and not equity to interpoſe, where the ſecurity gives the fair lender a good

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legal title; and it is all as one, whether such third lender, or purchaser, takes in a mortgage, that is an interest vested, or a statute that is only a charge; for both are real liens, and sufficient to overthrow the title of the mesne Incumbrancer, or whether money be due on the first incumbrance, or not, since that does not alter the legal title. *Marsh* and *Lee*, 2 *Vent.* 337, 338. 1 *Chan. Ca.* 162, 163. S. C. 1 *Chan. Ca.* 36. *Hard.* 173. 1 *Chan. Ca.* 149, 150. 2 *Chan. Ca.* 208. 1 *Vern.* 187. 1 *Chan. Ca.* 20, 166. 2 *Vern.* 157, 159.

2. A Man mortgages the manor and rectory of *D.* to *A.* and afterwards mortgages the rectory to *B.* without notice of the mortgage to *A.* and then *B.* purchases in a precedent incumbrance on both the manor and rectory; and the question was, when *B.* had received all the money due on the first security, whether he should receive any more profits of the manor, or only keep the incumbrance on foot, to protect the rectory; which was argued before *Finch* Lord Keep. in the presence of *Wild* and *Twisden*; and the two judges held, that *B.* should not receive the profits of the manor, after the first incumbrance was satisfied, because he had taken the rectory only for his security of that sum; and it would be unreasonable to give him a security beyond what he had in his original intention; but the keeper over-ruled it; for that when he had purchased the precedent incumbrances, that comprehended both the manor and rectory, and were forfeited at law, and therefore it was reasonable, that the estate should not be taken away by the mesne incumbrancer in a court of equity, which by no method could be evicted at law, unless such person would do equity, and pay the whole money due on both securities. 1 *Chan. Ca.* 201, 202.

3. If a man lends 600 *l.* on a mortgage, and afterwards discovering, that the estate is premortgaged to *J. S.* he gets in an old satisfied incumbrance, and brings his bill against *J. S.* to redeem, or be foreclosed, he need not prove the actual payment of any money for such precedent incumbrance; the having the Deed, or an acquittance, being sufficient, altho' it is objected, that *J. S.* is equally a purchaser with him. 2 *Vern.* 279.

4. If a prior mortgage or statute be brought in, pending a bill brought by *A.* against the mortgagor and *B.* who buys in such precedent statute or mortgage, to foreclose, tho' this purchase be *pendente lite*, yet it will protect *B.* he being at liberty to do what he can for his own security. *Trin.* 1687. *Taylor* and *Leigh*, 2 *Vern.* 29. Hawkins *verf.* Taylor and Leigh.

5. But where *A.* made a mortgage to *B.* and afterwards a commission of bankruptcy was taken out against him, and the commissioners made an assignment of his estate, and then *C.* lent the bankrupt 2000 *l.* on a second mortgage, having no notice of the bankruptcy, tho' he afterwards got in the first mortgage; yet it was held by two Lords commissioners against one, that this prior mortgage should not protect the mortgage subsequent to the bankruptcy; for every one is bound to take notice of a commission of bankruptcy. 2 *Vern.* 157, 160.

6. And tho' a purchaser or mortgagee may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust; for by taking such conveyance he becomes the trustee himself. *Vide* 2 *Vern.* 271.

(G) *Where a Perſon who comes to redeem muſt d Equity to the Mortgagee before he will be admitted.*

Gilb. Eq. Rep. 96 S. C. 1 P. Wms. 775. 2 Atk. 53. 3 Atk. 556. 630 *Prec. in Chan.* 419.

IF a mortgagor borrows more money of the mortgagee upo bond, where the heir is bound, and dies, the heir of th mortgagor ſhall not redeem without paying the bond-debt, as we as that ſecured by the mortgage; becauſe when the condition broken, ſo that the term or intereſt becomes abſolute in th mortgagee, if the heir of the mortgagor will have equity, he mu do equity, by the payment of the whole money due to the mor gagee; and this is called a *Rebutter*; but if the bill was exhib ed by the mortgagee; to foreclose; there, if the heir of th mortgagor tender principal and coſts, it ſufficeth without tend of the money due on the bond, becauſe ſuch bond was not origi ally any *Lien* on the land itſelf; and if that be tendered, which the land was originally pledged, there is no reaſon to d bar the heir of his right of redemption. 2 *Chan. Ca.* 164. 2 *Ch Rep.* 247. 1 *Vern.* 245. 2 *Chan. Ca.* 194, 195.

2. So where a huſband and wife levy a fine of the wife's la to enable them to take up the ſum of 400 *l.* and they make mortgage for it, and after the mortgage is forfeited, the huſb pays in part of the mortgage-money, but afterwards borrows ag the ſame ſum of the mortgagee; and it was decreed, that mortgagee having the eſtate in law in him by the forfeiture the mortgage, he ſhould hold the land againſt the heir of wife until the whole money was paid; and if the heir would pay in the whole principal, intereſt and coſts, he ſhould be fo cloſed. *Paſch.* 1682. *Reaſon* and *Sacheverell*, 1 *Vern.* 41.

3. So if a leſſee for years mortgages his term, and afterw borrows money of the mortgagee on bond, and dies, his exec ſhall not redeem without paying the bond as well as the m gage. 2 *Vern.* 177.

Prec. in Chan. 419. S. C. *Gilb. Eq. Rep.* 104. S. C. under the name of *Demary* and *Metcalf*. 2 *Vern.* 691. S. C.

4. The plaintiff pawned ſome jewels to *K.* who ſigned a w ing that they were to be redeemed in twelve months, other for the 110 *l.* lent, the were to be as bought and ſold; *K.* wi a ſhort time after delivers over the jewels, together with ſ plate of his own, to *M.* a *Bookſeller*, as a pledge for 200 *l.* *K.* afterwards borrowed 38 *l.* and 50 *l.* of *M.* on promiſſory n to be repaid on demand, and *M.* by anſwer inſiſted, it was ag that the pledge ſhould be a ſecurity, as well for the money o notes as for the money firſt lent, but could make no proof of ſuch promiſe or agreement; and though a redemption wa creed, yet it was on payment of all that was due to *M.* as upon the notes as on the pawns; but the goods of *K.* which pawned, were to be firſt applied as far as the value of them w extend. *Mich.* 1715. *Demainbray* and *Metcalf*.

5. If *A.* is bound in ſeveral bonds with *B.* as his ſurety for 4 and *A.* conveys the manor of *C.* to *B.* by way of mortga counter-ſecure him againſt the bonds for 4000 *l.* and *A.* dies after *D.* the ſon and heir of *A.* becomes bound with *B.* for 2

more; but there was no agreement that the mortgage ſhould be a ſecurity to *D.* againſt the bonds for 2000*l.* and after *B.* dies, his heir ſhall not be permitted to redeem upon payment of the 4000*l.* only, but muſt ſave *D.* harmleſs, as well touching the 2000*l.* as the 4000*l.* for he that would have equity help where the law cannot, muſt do equity to the party againſt whom he ſeeks to be relieved. *Hil.* 19 & 20 *Car.* 2. *St. John* and *Holdford*, 1 *Chan. Ca.* 97.

6. If *A.* acknowledges a ſtatute to *B.* for payment of 800 *l.* with intereſt, which being forfeited, and the lands extended upon it, *A.* for a valuable conſideration, ſettles the ſame lands in tail, and after borrows money of *B.* and by articles it is agreed, the ſtatute and extent ſhall ſtand a ſecurity for the laſt money, and after *A.* dies, and the 800*l.* with intereſt is ſatisfied by reception of the profits. yet the iſſue in tail ſhall not be relieved againſt the penalty of the ſtatute; for though the heir has an equity, by reaſon of the tail made upon a conſideration, yet the money lent raiſes an equity for *B.* ſo that *B.* hath both law and equity; whereas the heir in tail hath equity only till the penalty is ſatisfied. *Mich.* 4 *Car.* 2. *Sir John Hedworth* and *Primate Hard.* 318.

7. If a man makes two ſeveral mortgages of ſeveral lands, and dies, and one of the mortgages is of an entailed eſtate, or is deficient in value, the heir of the mortgagor ſhall not be admitted to redeem one without the other; 2 *Vern.* 207. neither ſhall the mortgagor himſelf redeem the one, and leave the defective mortgage, but he muſt take both together. 1. *Vern.* 29. 245. S. C.

8. The plaintiff as aſſignee of a ſtatute of bankruptcy, brought his bill to redeem a mortgage of the manor of *Newington*, in *Kent*, made by the bankrupt to the defendant; the defendant, by anſwer, inſiſted, thot he firſt lent the bankrupt 200*l.* on a mortgage of a particular tenement, and afterwards lent him 300*l.* on a mortgage of the manor of *Newington*, which was of better value than the money due; but the firſt mortgage was deficient in point of value; and it was held, that if the plaintiff will redeem one, he muſt redeem both. *Hil.* 1692. *Pope* and *Onſlow*, 2 *Vern.* 286.

9. If a man has a debt owing to him by mortgage, and another bond from the ſame perſon, he cannot tack them together againſt the mortgagor, but he ſhall be let into redemption, on payment of the mortgage-money *only (a)*; *but the heir in ſuch caſe will not be let into a redemption without payment of both*, becauſe the land in his hand is chargeable with the bond, even at law; and ſince the *(b)* ſtatute againſt fraudulent devices, the deviſee of the equity of redemption is in the ſame caſe with the heir, and cannot redeem without payment of both, becauſe the ſtatute makes ſuch deviſe void as againſt creditors, and then the deviſe ſtands in the ſame place as the heir muſt have done, if no deviſe had been made; but before that ſtatute ſuch deviſee would not be liable to the bond-debt. *Trin.* 1 *Geo. Challis* and *Caſhurn.* *Prec. in Chan. Vid.* 1 *Will. Rep.* 776. *in Notis* & 2 *Eq. Abr.* 603. *pl* 34. 407 S. C. ſays, it was ſo ſaid by Mr. *Vernon*, and agreed to by the Court — *Gilb. Eq. Rep.* 96 S. C. *in totidem verbis* with *Prec. in Chanc.*

(a) *Vide* 1 *Vern.* where it is held. that the mortgagor himſelf muſt pay both bond and mortgage; but Q. whether there be any difference when the mortgagor comes to redeem, and when the mortgagee brings a bill to foreclose. (b) That the vendee or deviſee of the equity of redemption was not obliged to pay both before the ſtatute againſt fraudulent devices, was reſolved *Hil.* 1698. *Baily* and *Robinſon. Precd. Chanc.* 89—

10. *A* mortgaged his eſtate to *B.* and then aſſigned the equity of redemption to *C.* afterwards *D.* obtained a judgment againſt *A.* and *B.* the mortgagee aſſigns to *D.* his mortgage, and then *C.*

tenders the money due on the first mortgage to *D.* who had notice of the assignment of the equity of redemption, upon his purchasing in his first mortgage; and it was here objected, that *D.* having the legal estate in him by the assignment of the forfeited mortgage, and *C.* having only an equitable interest, not supported by the legal estate, that if *C.* would have equity, he ought to do equity, by paying off both monies to *D.* But it was answered and resolved by the court, that *C.* should redeem, paying only the money due on the mortgage, and not what was due on the judgment, because the equity of redemption was never bound by the judgment, for the judgment was not confessed, so as to become a real *Lien* upon the estate at the time when this equity was assigned; and therefore the judgment could never charge or affect it, and consequently *C.* purchased an estate, not bound by the judgment, and by consequence the judgment-creditor, by purchasing in the prior Mortgagor, could never defeat the interest of *C.* *Trin.* 1708 *Breerton* and *Jones*, at the Rolls.

* 11. It was also declared, that if a person that had a first mortgage should, without the consent of the mortgagor, purchase in a subsequent judgment, that a mesne mortgagee or assignee of the equity of redemption should not be obliged to pay the money due on both securities, in order to redeem; because such transaction of the mortgagee was only to load the estate without the consent of the owner, when he had no prospect of bettering his own security. *Breerton* and *Jones.*

12. If the father is tenant for life, remainder to his son in tail, and the father mortgages to *J. S.* who finding his title defective, sends 100*l.* to the son, and takes a mortgage from him of the same land, *&c.* the son may redeem, paying the 100*l.* only for the son is a stranger to the estate of his father. *Hil.* 31 & 32 *Car.* 2. *Bromley* and *Hamond*, 2 *Chan. Ca.* 23.

13. So where a lunatick, before he became such, made a mortgage of good part of his estate for 50*l.* and the committee transferred this mortgage, and took up 3 or 400*l.* more upon it; and my lord chancellor declared the mortgage should stand a security for the 50*l.* only. *Mich.* 1684. *Foster* and *Merchant*, 1 *Vern.* 26

(H) *Mortgage-money, to whom to be paid.*

1. WHERE a mortgage was made upon condition that the Mortgagor paid a certain sum to the mortgagee, his heirs, executors or administrators, that then the mortgagor should re-enter, and the day passed without payment, and the mortgagee died: great doubt was, whether the money should be paid to the heir or executor of the mortgagee: and it was formerly held, that where the heir was named in the condition, and no bond or covenant given to make it appear a personal matter; and there was a deficiency of assets to pay creditors; that in such case the heir parting with the benefit descended to him, should have the money on the mortgage. 1 *Chan. Ca.* 88. 1 *Chan. Rep.* 181, 182.

2. But afterwards it was truly settled in several cases by Lord Chancellor *Finch*, that the money should go to the executors

Ad

adminiſtrators, and not to the heir; and the reaſon was, becauſe equity follows the law; and at common law, if conditions or defeaſances of mortgages are ſo penned, as no mention is made either of heirs or executors, in that caſe the money ought to be paid to the executors, becauſe the money came out of the perſonal eſtate, and therefore ought to return thither again; but if the defeaſance appoints the money to be paid to the heir or executor disjunctively, if the mortgagor pays the money preciſely at the day, he may elect to pay it either to the heir or the executor; but where the preciſe day is paſt, and the mortgage forfeited, all election is gone in law, for in law there is no redemption; and when the caſe is reduced to an equity of redemption, it were perfectly againſt equity to revive the election of the mortgagor, becauſe that would only tend to the delay of the payment of the money as long as he pleaſed, and end in compoſitions to pay the money into that hand which would uſe him beſt; and to ſay that the election ſhould be in the court, would be to place an arbitrary power in it, which would tend to the inconvenience of the ſubject, ſince no man could ſafely pay the money in ſuch caſes, without applying to the court in a ſuit in equity; and therefore ſince there ought to be a certain rule, a better cannot be choſe, than to come as near as can be to the rule and reaſon of the common law; and as the law always gives the money to the executor, where no perſon is named, ſo where the election to pay, either to the heir or executor, is gone and forfeited in law, it is all one as if neither heir nor executor were named in the condition; and then equity following the rules of the common law, ought to give it to the executor; for in natural juſtice and equity, the principal right of the mortgagee is to his money, and his right to the land is only as a *depoſit* or pledge for his money; and therefore the money ought to be paid to the proper hand that the mortgagee has appointed receiver of it; and that is his executor; and then the heir, who is only a truſtee to keep the pledge, ought to deliver it back to the Mortgagor; and though the heir has the uſe and benefit of the land till redeemed, yet he has it only as a pledge, and therefore is a truſtee to reſtore it when the money is paid to the proper hand; and the heir himſelf, though he be proper to keep the pledge, being land, yet he is not proper to receive the money, it being purely perſonal; and it is not hard that the heir ſhould part with the land, without having the money that comes in lieu of it, becauſe the money was originally parted with from the perſonal eſtate, and had immediately come into the hands of the executor, had it not been placed out on this real ſecurity; and therefore it has ſince been decreed, whether the executor has aſſets, or not, that the mortgage-money ſhould be paid him. 1 *Chan. Ca.* 283. 2 *Chan. Ca.* 50, 51, 220. 2 *Vent.* 348, 351. 1 *Chan. Rep.* 183. 2 *Chan. Rep.* 155, 242. 1 *Chan. Ca.* 88. *Hard.* 467. 1 *Vern.* 170, 412.

3. If the heir of the mortgagee foreclоſes the Mortgagor, the executor being no party, upon a bill by the executor againſt the heir of the mortgagee and the morgagor, the land will be decreed the executor. *Gobe* and *the Earl of Carliſle*, 2 *Vern.* 66. cited to be adjudged.

4. But

4. But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the Benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest. 2 *Vern.* 67 *per Curiam.*

5. If there be a mortgage in fee of a long standing, and there are two descents cast since the mortgage was made; and though the mortgagor, by answer, says he will not redeem, yet the mortgage should go to the executor, and not the heir, the equity of redemption not being foreclosed or released. *Tabor* and *Greaves*, 2 *Vern.* 367.

6. But if a mortgage in fee enters for a forfeiture, and after seven years enjoyment, absolutely sells the land to *J. S.* and his heirs; the estate shall not be looked upon to be a mortgage in the hands of *J. S.* so as to make it part of his personal estate; but it shall be for the benefit of his heir. *Mich.* 1684. *Cotton* and *Iles*, 1 *Vern.* 271.

(I) *Mortgagee answerable for the Profits, and how to account.*

1. THE mortgagee is answerable in equity when he comes into the possession of the lands, for the profits that he made of the lands, and not for the profits that he might have made, unless there were fraud; for it is the fraud and laches of the mortgagor, that he would let the lands lapse into the hands of the mortgagee by the non-payment of the money; and when it doth, he is only a bailiff for what he doth receive; but is not bound to the trouble and pains of making the best of what is another's. *Toth.* 133. 1 *Vern.* 476, 477.

2. If a mortgagee in possession assigns over his mortgage, without assent of the mortgagor, the mortgagee is bound to answer the profits, both before and after the assignment, though assigned only for his own debt; for he is under a trust to answer the profits of the pledge; and it is a breach of trust to assign such pledge to a person insolvent; but *quære*, if the mortgagor hides, so that he cannot be served with a *Subpœna* to foreclose, whether the mortgagee may not assign, and not be answerable for the profits after assignment. 3 *Chan. Ca.* 3.

3. A mortgagee shall not be bound by any proof, that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful default; as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it. 1 *Vern.* 45.

4. If a mortgagee manages the estate himself, there is no allowance to be made him for his care and pains; but if he employs a skilful Bailiff, and gives him 20 *l. per Ann.* that must be allowed; for a man is not bound to be his own bailiff. 1 *Vern.* 316.

5. If an infant, by his guardian, endeavours to overthrow the mortgage, by a supposed intail, and after a special verdict and great agitation at law, the mortgagee prevails, and the infant brings

brings his bill to redeem, the mortgagee having ſworn he paid and expended above 120 *l.* in defending his mortgage at law, although he had but 60 *l.* coſts allowed him there, ſhall not be held down to the taxation at law, but ſhall, on the account, be allowed all he laid out or expended; and if the mortgagee, in this caſe, fearing that his mortgage would be defeated at law, gets adminiſtration as principal creditor, in the ſpiritual court, he ſhall be allowed the coſts expended there alſo. *Hil.* 1705. *Ramſden* and *Langley*, 2 *Vern.* 536.

6. The mortgagee obtained judgment in ejectment, and entred on the mortgaged premiſſes, and thereby prevented other creditors that had ſubſequent incumbrances, from entering, and yet permitted the mortgagor to take the profits; and the other incumbrancers coming to redeem him, the court ordered the mortgagee ſhould be charged with all the profits he had, or might have, received ſince his entry. 1 *Vern.* 270.

7. So where a bankrupt, before he became ſuch, having made a mortgage of his eſtate, and the aſſignees of the ſtatute brought an ejectment for recovery of the lands comprized in the mortgage, and the mortgagee refuſed to enter, but ſuffered the bankrupt to take the profits, and to fence againſt the aſſignees with the mortgage; and it was held, that the mortgagee ſhould be charged with the profits from the time of the ejectment delivered. *Mich.* 1684. *Chapman* and *Tanner*, 1 *Vern.* 267. 1 *Vern.* 258. S. P.

8. *A.* mortgaged the manor of *T.* to *B.* to which an advowſon was appendant, *B.* brought a bill to foreclоſe, the church became void, and he likewiſe brought a *quare impedit* at law; and on a motion to ſtay the proceedings on the *quare impedit*, the court held, that though *A.* had no bill, yet being ready, and offering to pay the principal, intereſt and coſts, if *B.* will not accept his money, intereſt ſhall ceaſe; and an injunction to ſtay proceedings in the *quare impedit* granted; for the mortgagee can make no benefit by preſenting to the church, nor can account for any value in reſpect thereof, to ſink or leſſen his debt; and the mortgagee therefore in that caſe is but in the nature of a Truſtee for the mortgagor. *Mich.* 1700. *Amhurſt* and *Dawling*, 2 *Vern.* 401.

(K) *How the Aſſignee of the Mortgagee is to account.*

1. IF the mortgagee aſſign his mortgage, and the mortgagor comes to redeem againſt the aſſignee, all monies really paid by the aſſignee, either as principal or intereſt, ſhall be principal to the aſſignee, and ſhall bear intereſt; otherwiſe it is if the aſſignee had not paid the money; and the aſſignment was only colourable, in order to load the mortgagor with compound Intereſt. *Smith* and *Pemberton*, 1 *Chan. Ca.* 67, 258. 1 *Vern.* 169. 2 *Vern.* 135.

2. If a ſtranger gets an aſſignment of a mortgage for leſs than is due, the mortgagor or his heir ſhall not redeem without paying all the money due; but if a man purchaſes the mortgaged lands without notice of this incumbrance; whether he has not an equity to redeem them, for what was really paid by the ſtranger, *quære.* 1 *Vern.* 336.

3. But

3. But if there are ſubſequent incumbrancers or creditors in the caſe, a man who buys in a prior incumbrance, ſhall againſt them be allowed only what he really paid, though there was in truth a greater ſum due. 1 *Vern.* 476.

CAP. XLII.

Notice.

(A) *Of preſumptive Notice, and where Notice to one Perſon ſhall affect another.*

(B) *How far a Man is affected who acts againſt expreſs Notice, or contrary to what he is obliged to take Notice of at his Peril.*

(C) *Purchaſers without Notice, in what Caſes favoured.*

(A) *Of preſumptive Notice, and where Notice to one Perſon ſhall affect another.*

1. IF *A.* having notice that lands were contracted to be ſold to *B.* purchaſes thoſe lands, and takes a conveyance to the ſon and his heirs; though the ſon had not notice of *B.*'s contract, yet notice to his father ſhall affect him. *Mich.* 15 *Car.* 2. *Abney* and *Kendal*, 1 *Chan. Ca.* 38.

2. So if one who purchaſeth for another hath notice of a dormant incumbrance, it ſhall affect the very purchaſer. 1 *Chan. Ca.* 38. *per Curiam.*

3. If a man lends money on a mortgage, and the ſcrivener, who was intruſted to draw the mortgage-deed, had notice of a prior mortgage, this notice ſhall affect the ſecond mortgagee. *Vide* 2 *Vern.* 574.

4. So if *A.* having notice of an incumbrance, purchaſes in the name of *B.* and then agrees that *B.* ſhall be the purchaſer, and he accordingly pays the purchaſe-money without notice of the incumbrance;

brance; though *B.* did not employ *A.* nor knew any thing of the purchaſe till after it was made, yet *B.* approving of it afterwards, made *A.* his agent *ab initio*, and therefore ſhall be affected by the notice to *A.* 2 *Vern.* 609.

5. *A.* purchaſed lands, having notice of a ſettlement, which was delivered to him amongſt other writings, whereby it appeared, that the vender was but tenant for life, remainder to his firſt, &c. ſons in tail male; upon his purchaſe he took in a mortgage term, which was prior to the ſettlement, and entered, and afterwards ſold the lands to *B.* and *C.* who had no notice; upon a bill brought by the ſon, after the death of his father, who was but tenant for life, againſt *B.* and *C.* his two vendees, it was decreed, that as to the two vendees, who were purchaſers without notice, the bill ſhould be diſmiſſed, and that *A.* ſhould account for the purchaſe money, which he received, with intereſt, from the death of the tenant for life, thereout diſcounting what was due on the Mortgage term, made prior to the ſettlement. *Mich.* 1700. *Ferrars* and *Cherry*, 2 *Vern.* 384.

6. *A.* purchaſed an eſtate with notice of an incumbrance, and then ſold it to *B.* who had no notice, who afterwards ſold it to *C.* who had notice; and it was held by the maſter of the rolls, that by this, the firſt notice to *A.* the firſt purchaſer was revived, and that *C.* the laſt purchaſer ſhould be liable to the incumbrance, as if the lands had never been in the hands of one who had no notice; but upon a rehearing, my Lord Keep. reverſed it; for otherwiſe an innocent purchaſer without notice, muſt be forced to keep the eſtate and cannot ſell it. *Hil.* 1695. *Harriſon* and *Forth.*

Prec. in Chan. 51. S. C. *Vid.* A Caſe ſimilar to this, in 2 *Equ. Abr.* 685 *pl.* 10. *Caſ. Temp. Talb.* 187. *Lowther* and *Carleton.*

7. *A* makes a conveyance to *B.* with power of revocation by will, and limits other uſes; if *A.* diſpoſe to a purchaſer by the will, another purchaſer ſubſequent is intended to have notice of the will, as well as of the power to revoke; and this is in law notice; and ſo it is in all caſes where the purchaſer cannot make out a title but by a deed, which leads him to another fact, the purchaſer ſhall not be a purchaſer without notice of that fact, but ſhall be preſumed cogniſant thereof; for it is *craſſa negligentia*, that he ſought not after it. *Mich.* 30 *Car.* 2. *Moor* and *Bennett*, 2 *Chan. Ca.* 246 1 *Vern.* 149, 319. S. P. 2 *Vern.* 662. S. P. *Vid. aut. ante* 256. *pl.* 1.

(B) *How far a Man is affected who acts againſt expreſs Notice, or contrary to what he is obliged to take Notice at his Peril.*

1. *A.* made *B.* and *C.* his executors, and died; *C.* obtained a decree againſt *B.* to hinder him from receiving any more of the perſonal eſtate, &c. and a perpetual injunction for that purpoſe was granted before and ſequeſtration againſt *B.* *J. S.* who was indebted by a mortgage of 1000 *l.* to the teſtator, paid the 1000 *l.* to *B.* and has his mortgage delivered up to be cancelled; bat it appearing that he paid the money after notice of the decree, (being preſent at the hearing, &c.) he was ordered to pay it over again. *Trin.* 34 *Car.* 2. *Harvey* and *Mountague*, 1 *Vern.* 57 & 122. S. C.

2. If

2. If *A.* lends *B.* her brother-in-law 100 *l.* and takes bond for it in the name of *J. S.* and upon ſome difference between *A.* and *B. A.* puts the bond in ſuit, in the name of *J. S.* her truſtee, and *B.* to avoid expence confeſſes judgment, and afterwards pays the money to *J. S.* the truſtee, he ſhall be obliged to pay it over again, having notice of the truſt; and it is ſufficient evidence of fraud and notice, that there was a new attorney made to acknowledge ſatisfaction on the judgment, and not the attorney on record, who was firſt employed by *A. Mich.* 1690. *Pritchard* and *Langher*, 2 *Vern.* 197.

3. If a man has a debt due to him by bond, and he aſſigns the bond to *J. S.* and the obligor, after notice of the Aſſignment, pays the money to the obligee, ſuch payment is not good. 2 *Vern.* 540. But if he had paid it without notice of the aſſignment, it would be otherwiſe. 1 *Chan. Ca.* 232.

4. An adminiſtrator pays money on ſpecialties, without notice of money decreed, and had fully adminiſtered the aſſets; and the court nevertheleſs, decreed that the adminiſtrator ſhould pay the money. Decreed *Hil.* 1688. *Searle* and *Hale*, 2 *Vern.* 37, 88. S. P. for a duty decreed is equal to a judgment at law.

5. If a deviſee obtains a decree to hold and enjoy certain lands againſt the heir, who it was ſuppoſed had ſuppreſſed the will, and pending the ſuit, a third perſon gets an aſſignment of a mortgage made by the teſtator, and then purchaſes the equity of redemption of the heir, with notice that there was ſuch a will, the court will not admit him to examine the juſtice of the former decree, nor to try at law, whether ſuch will was cancelled or deſtroyed by the teſtator. *Hil.* 1690. *Finch* and *Newnham*, 2 *Vern.* 216, 217.

6. A purchaſer or mortgagee ſhall not protect himſelf, by taking a conveyance from a truſtee, after notice of the truſt; for by taking ſuch a conveyance he becomes the truſtee himſelf. 2 *Vern.* 271. So if a man purchaſes from a truſtee with notice, and levies a fine, and five years paſs, yet it ſhall not avail; for by purchaſing from the truſtee with notice, he becomes the truſtee himſelf. 1 *Vern.* 149.

7. If an executor in truſt for an infant, reſiduary legatee, renews a leaſe, part of the teſtator's perſonal eſtate, in his own name, and afterwards mortgages it, and aſſigns the equity of redemption to a truſtee, to ſell for payment of his own debts, and the truſtee ſells to one who had notice of the infant's title, the purchaſe will be ſet aſide. 1 *Vern.* 484.

8. A man who lends money to a bankrupt after a commiſſion ſued out againſt him, but before actual notice of it, cannot come in under the ſtatute as a creditor; by two lords commiſſioners againſt one who doubted. 2 *Vern.* 157.

9. The Earl of *Newport* had two daughters, and he deviſed *Newport Houſe* to the daughter of his eldeſt daughter in tail, which ſhe had by the Earl of *Banbury*; provided, and upon condition, that ſhe marry with the conſent of her mother and two other truſtees, or the major part of them; if not, or if ſhe ſhould die without iſſue, then he deviſed the ſaid houſe to one *Porter* in fee. The Lady *Anne Knowles*, the firſt deviſee, married *Fry*, without the conſent of her Grandmother or truſtees; and it was

adjudged

adjudged againſt her, upon point of notice, that it was not neceſſary, becauſe her grandfather had not appointed any perſon to give notice; and he might have impoſed any terms or conditions upon his own eſtate; and all parties concerned had the ſame means to inform themſelves of ſuch conditions. *Fry* and *Porter*, adjudged in *C. B.* 1 *Vent.* 199. 2 *Lev.* 21. S. C. 3 *Keb.* 19. S. C. and in chancery, 1 *Chan. Ca.* 142. 1 *Mod.* 86, 300.

10. But if lands are conveyed or deviſed to an heir at law, upon condition, as he has a more worthy title which is by diſcent, expreſs notice muſt be given him thereof. 8 *Co.* 9. *Frances's* caſe. 3 *Mod.* 28, 29. *Mallon* and *Fitzgerald.*

(C) *Purchaſers without Notice, in what Caſes favoured.*

1. A Man who purchaſes without notice of any prior incumbrance, or on any prior right to the eſtate, ſhall not have his title impeached in equity; neither ſhall he be compelled to diſcover any writings, *&c.* which may weaken his title; nor ſhall he have any advantage taken from him, by which he may defend himſelf at law. *Rep. in Chan. Temp. Finch* 9, 34, 35. 2 *Chan. Ca.* 47, 48. 2 *Vern.* 599, 701. He muſt plead himſelf a purchaſer without notice, 1 *Vern.* 179. *(a)* but he need not ſet forth the conſideration he paid. 1 *Chan. Ca.* 34.

Vide Title *Purchaſe and Purchaſer.*

(a) That he muſt alſo ſet forth the particular conſideration he paid. *Vide.* 2 *Freeman's Rep.* 43. 2 *Equ. Abr.* 681. *pl.* 2.

2. A bill was exhibited to prove a will, and perpetuate the teſtimony of witneſſes; the defendant pleaded himſelf a purchaſer without notice of any ſuch will, and inſiſted, that unleſs there had been a verdict in affirmance of ſuch will, (nothing hindering the plaintiff, but that if he had a title he might recover at law) the plaintiff ought not to be admitted to examine his witneſſes, thereby to hang a cloud over a purchaſer's eſtate; and upon debate the court allowed the plea. *Hil.* 1 & 2 *Jac.* 2. *Bechinal* and *Arnold*, 1 *Vern.* 354.

3. Tenant for life, remainder to his firſt ſon, mortgaged for 1500 *l.* the deed of ſettlement was then produced, and ſeen by the purchaſer, who notwithſtanding lent the money, being adviſed, that tenant for life, not having then any ſon born, could deſtroy the contigent remainders, whereas in truth there was a ſon born five days before the lending of the money; but the mortgagee having no notice thereof, and having got the deed of ſettlement, the court would not relieve againſt the purchaſer, but diſmiſſed the bill. *Trin.* 1671. *Brampton* and *Barker*, 2 *Vern.* 159. cited by Lord *Rawlinſon.*

* 4. The plaintiff's bill was to ſet aſide a conveyance made to the defendant by *A.* and that he defendant was no real purchaſer; or if he were, yet before his purchaſe he had notice, that the eſtate was ſubject to a truſt for the plaintiff; and that ſuch a leaſe in the defendant's cuſtody mentions it. Defendant ſwears himſelf a purchaſer without notice of any truſt, and that the ſaid leaſe mentions no ſuch truſt. Plaintiff replies, and the defendant proves his purchaſe, and the plaintiff proves no notice upon him; but at the hearing inſiſted he ought to produce the leaſe, to ſhew there was no ſuch mention of the truſt; and the defendant inſiſting

2 *Vern.* 463. S. C.

ing he was not obliged to produce it, he being a purchaſer; for the plaintiff it was argued that he ought to produce it, becauſe his anſwer being replied to, he ought to prove it, which without ſhewing the deed he cannot; and he takes upon him to judge what deed will amount to notice, and what not; which he ought not to do; for implied notice is as ſtrong as expreſs notice; and if the ſaid leaſe mentions only the date, and parties of another deed which mentions a truſt, 'tis an implied notice, which the defendant may not know, and therefore ought to produce it, that the court may judge of it. On the other ſide it was ſaid, that by the conſtant rules of this court, a purchaſer was not obliged to ſhew his title; and this is an attempt to alter that rule by a ſide wind; and 'tis as eaſy in a bill to ſay it is in ſome of the deeds, as in any one in particular, and then he muſt expoſe them all, which would be of dangerous conſequence to purchaſers. 'Twas replied, if the deed be not to be produced, then if one has a mortgage with a proviſo of redemption, yet if the mortgagee will be ſo hardy as to ſwear it an abſolute purchaſe, and the mortgagor has no counterpart, he muſt loſe his eſtate. The maſter of the rolls thought, as this caſe is, it ought to be produced; but my Lord Keeper held otherwiſe; and he ſaid it was but a ſide wind to make a purchaſer expoſe his title, and would not do it, unleſs the plaintiff had made ſome proof towards falſifying his anſwer, to induce him to it. *Mich*, 1704, *Hall* and *Atkinſon*.

5. But where a defendant pleaded himſelf a purchaſer for valuable conſideration, and denied by way of anſwer, that he had notice of the plaintiff's title at the time of his purchaſe or contract, and the plea was over-ruled; for an evaſive denial is not ſufficient; and here the word *purchaſe* might be underſtood, when the contract for the purchaſe was made; and it might be he had no notice then, and might have notice after, before or at ſealing the conveyance. *Mich.* 15 *Car.* 2. *Moor* and *Mayhow*, 1 *Chan. Ca.* 34.

Vid. 2 *Equ. Abr.* 682. *pl.* 1.

* 6. A purchaſer for valuable conſideration ſhall hold, or take place, againſt a prior voluntary ſettlement, tho' he had expreſs notice thereof at the time of his purchaſe, ſuch voluntary ſettlement by 27 *Fliz.* being made void againſt a purchaſer with or without notice. *Mich.* 1727. *Tonkins* and *Ennis*; *per Cur'*.

CAP.

CAP. XLIII.

Portions.

(A) *Portions and Proviſions for younger Children made Good in Equity.*
(B) *At what Time Portions ſhall be raiſed, or Reverſionary Eſtates or Terms ſold for that Purpoſe.*

(A) *Portions and Proviſions for younger Children made good in Equity.*

1. *A.* Having iſſue a daughter by a former venter, charged his lands at *B.* for payment of 3000 *l.* portion to ſuch daughter and afterwards married a ſecond wife, and made her a jointure of a moiety of theſe lands at *B.* without taking notice of this charge of 3000 *l.* and afterwards by will, thinking that this 3000 *l.* charged as aforeſaid, would be good againſt the jointure, and taking no notice thereof, deviſed to his wife other lands in *Y.* in lieu of her jointure in *B.* and died; the wife and ſon and heir agreed together, to defeat the daughter of her 3000 *l.* portion: and therefore the wife, finding that the ſettlement which was made on her marriage, tho' ſubſequent in time would yet prevail againſt this charge of 3000 *l.* which was voluntary and fraudulent as to her, adhered to her jointure, and refuſed to accept of the deviſe; but on a bill brought by the daughter, Lord Keep. decreed, that he ſhould hold ſuch part of the lands in *Y.* as ſhould be equal in value to ſuch of the lands in *B.* as were compriſed within the jointure, until her portion was raiſed. *Hil.* 1683. *Reeve* and *Reeve*, 1 *Vern.* 219. 1 *Vent.* 363. S. C. *vide* 2 *Vern.* 321.

Vide Title *Deviſee*, Title *Legacy*; where Portions ſhall ſink in the Inheritance for the Benefit of the Heir, Title *Heir*,

2. If a man by will gives 3000 *l.* to his younger children, which ſum is due from *J. S.* and ſecured by mortgage; and adds, that for the more ſure payment of the ſaid ſum, in caſe his ſon and heir, whom he appointed his executor, ſhould not pay the ſame according to his will, then he deviſed his lands, to his younger children, for the raiſing and payment thereof, &c. and dies; *J. S.*

prefers

prefers a bill againſt the heir, and younger children, to redeem; and purſuant to a decree for that purpoſe, the 3000 *l.* is put out by a maſter, upon a ſecurity that proves ill; the eldeſt ſon ſhall not be compelled to pay it over again to the younger children. *Mich.* 1685. *Oldfield* and *Oldfield*, 1 *Vern.* 336, 337. *for it was not in the power of the heir to compel* J. S. *to keep the money in his hands.*

3. But if the lands of the heir be charged with portions for infants, payable at twenty-one, or marriage, the portions ſhall not be admitted to be paid in before they ſhall grow due, in caſe of the land, nor ſhall the real ſecurity be turned into a perſonal one. 1 *Vern.* 338. *per Curiam.*

4. If by a marriage ſettlement portions are provided for daughters, the father cannot by his will annex any condition to the payment of them, or deviſe them over in caſe of the death of any of the daughters, before their portions become payable. 2 *Vern.* 452, *per curiam. in Aſton* v. *Aſton.*

5. Tenant in tail with, remainder in fee to himſelf, levies a fine, and ſettles his eſtate on truſtees, in the firſt place, to pay his ſon and heir 100 *l. per Ann.* and then to make proviſion of 100 *l.* a-piece for his younger children, to be raiſed and paid according to their ſeniority, and a maintenance in the mean time. In this caſe the Lord Chancellor decreed, 1*ſt*, That whereas at the time of the ſettlement, the party that made it was a widower, and had eight children by his firſt wife, and declared, that he intended not to marry again; yet in regard he afterwards married a ſecond wife, and had many children by her, that the children by the ſecond wife were equally intitled with the children of the firſt, to have the benefit of this proviſion for his younger children. 2*dly*, That whereas the deed directs the proviſion for his younger children ſhould be raiſed, and paid according to their ſeniority, that yet in caſe there ſhould happen a deficiency, the eldeſt ſhould not have more, and the younger leſs, but they ſhould all be paid in average. 1 *Vern.* 335.

6, If by marriage ſettlement 2500 *l.* is provided for the iſſue of that marriage, in ſuch proportion as the huſband ſhall appoint, and he dies without making any appointment leaving a daughter only, the daughter ſhall have the 2500 *l.* *Davy* and *Hooper*, 2 *Vern.* 665.

(B) *At what Time Portions ſhall be raiſed, or reverſionary Eſtates or Terms ſold for that Purpoſe.*

1. *A.* Made a ſettlement to the uſe of himſelf for life, remainder to the uſe of his firſt ſon in tail Male, remainder to truſtees for forty years, remainder to himſelf in fee; the term was declared to be a truſt, that in caſe it ſhould happen that the ſaid *A.* ſhould die without iſſue male of his body, *i. e.* of the marriage, then the truſtees ſhould raiſe 5000 *l.* for daughters portions, payable at the age of twenty-one or marriage, with a proviſion for maintenance in the mean time; the wife died, leaving

two

wo daughters, iſſue male; and it was reſolved, that the right to he portion was veſted by the mother's death, without iſſue male n the life of the father; for otherwiſe the father might live ſo ong, that the portions might be of little ſervice. *Greaves* and *Mattiſon*, 2 *Jones* 201.

* 2. So where a ſettlement was made to the huſband for life, emainder to the wife for life, remainder to the firſt and other ſons in tail male ſucceſſively, remainder to truſtees for 200 years; and the term was declared to be upon truſt, that the truſtees after the death of the huſband and wife ſhould out of the rents and profits raiſe and pay 4000*l.* for younger children at their age of twenty-one years, unleſs the perſon in remainder ſhould raiſe and pay the ſame; and the term was decreed to be ſold, and the portions raiſed in the life-time of the father and mother. *Mich.* 1. *W. & M. Hellier* and *Jones.*

3. A ſettlement on the marriage of *A.* with *B.* was made on the huſband for life, remainder to the wife for her jointure, remainder to the firſt and other ſons; and in caſe of failure of iſſue male of that marriage, if there ſhould be iſſue female only one daughter, then to truſtees for 500 years in truſt to raiſe 500*l.* for ſuch daughter, to be paid at her age of twenty-one years or day of marriage, which ſhould firſt happen next after the death of the father and mother, or within ſix months after either of thoſe days or times; and there being one daughter only, and ſhe having attained twenty-one, and her father being dead, the portion was decreed to be raiſed in the life-time of the mother. *Hil.* 1703. *Gerrard* and *Gerrard*, 2 *Vern.* 458. 2 *Freem.* 271. S. C. and Decree.

4. So where by a marriage ſettlement lands were limited to the huſband and wife for their lives, remainder to the heirs male of their bodies; and if there ſhould be no iſſue male of their bodies, and one or more daughters, then to the truſtees for 500 years from the deceaſe of the ſurvivor, in truſt, by ſale or mortgage, to raiſe 1000*l.* for daughters portions; but there was no time appointed for the payment of them; and the father died leaving a daughter only; the portion veſting in the daughter in the life-time of the mother, it was decreed to be raiſed by a ſale, with reaſonable maintenance in the mean time, tho' no maintenance was provided by the ſettlement. *Hil.* 1703. *Stainforth* and *Stainforth*, 2 *Vern.* 460. *Staniforth* v. *Staniforth.* 2 *Vern.* 460.

5. But where the defendant, upon his marriage, by leaſe and releaſe ſettled part of his eſtate to the uſe of himſelf for life, remainder to truſtees during his life. to ſupport contingent remainders, remainder to truſtees for 500 years upon the truſt after mentioned, remainder to the heirs male of his body on the body of *M.* his then wife to be begotten, remainder to his own right heirs, and declares the term of 500 years to be upon truſt, That in caſe he ſhould happen to die without iſſue male of his body on the body of his ſaid wife begotten, or that the iſſue male begotten between them ſhould happen to die without iſſue male of their bodies, before they or ſome of them reſpectively attain their ſeveral ages of twenty-one years, and there ſhould be iſſue one or more daughter or daughters of his body on her begotten, either born in or after his life-time, who ſhould be unmarried, or not provided for as herein after is mentioned, at the time of his deceaſe, then ſuch daughter, if but 1 *Salk.* 159. S. C.—— 2 P. Wms. 98. 2 *Vern.* 640. S. C.—— 3 *Chan.* 190. S. C.

" one, to have 2000*l.* for her portion; and if two or more
" ſuch daughters, then they to have 2000*l.* between them, to be
" paid and payable at their reſpective ages of eighteen years, or
" days of marriage, which ſhould firſt happen, or as ſoon as they
" could be raiſed; and in caſe the ſaid portion or portions of the
" ſaid daughter or daughters ſhall not be paid according to the
" purport and intent of theſe preſents, then the truſtees, or the
" ſurvivor of them, their executors, *&c.* ſhall and may out o
" the rents, iſſues and profits, or by mortgage or ſale of the ſaid
" premiſſes, raiſe, make up and pay the ſaid portion and porti-
" ons to the ſaid daughter and daughters; and in the mean time
" and until the ſaid portion and portions ſhall reſpectively becom
" payable as aforeſaid, the ſaid truſtees, their executors, &
" ſhould out of the rents, iſſues and profits of the ſaid premiſſe
" raiſe and pay the yearly ſum of 30*l.* a-piece, for the mainte
" nance and education of ſuch daughter or daughters; provided
" that if the defendant in his life-time, either before or after th
" death of his wife, pay or ſecure to be paid to the ſaid daugh
" ter or daughters (which ſhall be unmarried at the time of h
" death) the ſaid portion or portions, or if he ſhall have iſſu
" male, who ſhall live to twenty-one years of age, then, and
" ſuch caſe, the ſaid term of 500 years to ceaſe and be void.
Afterwards the wife died without iſſue male, leaving only o
daughter the plaintiff's wife, who was upwards of twenty ye
of age; and the defendant having married a ſecond wife, and r
fuſing to give the plaintiff one penny portion with his wife, t
bill was brought to have a decree for ſale of the term in remai
der preſently, and the portion with intereſt paid from her attai
ing eighteen years of age; but my Lord Chanceſſor having tak
time to conſider of it diſmiſſed the bill; the difficulty, he ſaid,
this caſe, was occaſioned by the multiplicity of words, and the
fore to apprehend it the better, he had rejected the immate
words, and retained only thoſe that were material; th
he took notice, that the term was a term veſted and ſaleable;
only queſtion was, whether it was to be ſold; and this depend
on the declaration of the truſt; for if the truſt had declared
portion to be raiſed at eighteen, or marriage, ſhe ſhould not h
ſtaid for her portion till the death of her father, but the term
remainder ſhould have been ſold preſently, and ſo has been
conſtant practice of this court; nay if the term itſelf had b
limited on a condition precedent, as if the father ſhould die w
out iſſue male of his body by ſuch a wife, then to truſtees
200 years, to raiſe portions for daughters at eighteen or marria
though in this caſe the condition was precedent even to the v
ing of the term; yet upon the death of the mother without i
male, the precedents have gone, that the term ſhould be
in the life-time of the father; and this court hath warranted
title, though the term itſelf was not veſted, which
much ſtronger caſe than this, where the term is ve
preſently, and the truſt is only conditional; tho
he ſaid, if this caſe was *res integra*, he ſhould not
gone ſo far in either of thoſe caſes, becauſe the plain and na
meaning of the deed cannot be to raiſe the portions in the
time of the father, when the fund, out of which it is to be
ed, is not to take effect till after his death; but thus far

urt has gone, and the reaſon that may be preſumed for it was, at in equity they look'd on the death of the wife without iſſue ale an equitable performance of the condition, though it was not literally at law, till the father's death; becauſe all that was ntingent in the condition by the death of the mother, without ue, had happened; 'twas now impoſſible he ſhould die leaving ſue male by her; for he was now become as it were tenant after ſſibility; and it was now no more than if it had been limited he ſhould die, or when he ſhould die, the remainder to truſ- es, *&c.* which is a remainder veſted preſently, becauſe it de- ends upon that which muſt certainly happen; ſo if the condi- on had been annexed to the execution of the truſt of the term, et upon the death of the mother without iſſue male, the term ould have been ſold in the life-time of the father, for the ſame aſons as in the other; and the reaſon of the court's having one ſo far, was to promote ſuitable matches, and that women ight have their portions when they were likely to do them moſt rvice; for as this court does ſometimes prolong the time for yment of money, ſo it may ſometimes ſhorten and abridge it; d had this caſe been like the others before mentioned, he ſhould ve decreed it accordingly; but this materially varies from em; for in none of them are the words following, *viz. unmar- d, or unprovided for, as herein after mentioned, at the time of deceaſe*; which words are a deſcription of, and ſuit only with e perſon who is to have the portion, *viz.* ſuch daughter as is married, or unprovided for, at the death of the father; and ugh in this caſe ſhe is already married, yet ſhe may be pro- ded for in the father's life-time; and ſo this part of the contin- ncy, whether ſhe will be unprovided for at her father's death ſtill to come; for ſhe who will claim the portion by this ſettle- ot, cannot ſay ſhe is unprovided for at his death, which during life none can ſay; and this conſtruction is the ſtronger from clauſe which appoints the maintenance, for that is only out of rents and profits; whereas the portions are to be out of the s and profits, or by mortgage or ſale; and rents and fits in the firſt clauſe, being put in contradiction to mortgage ſale in the ſecond, muſt be reſtrained, and cannot warrant rtgage or ſale; and the maintenance appointed in the mean e, that is from failure of iſſue male, till payable, if the portion uld be then due, the maintenance would run on the father's e for life; which ſurely will not be pretended; but this is beyond diſpute by the proviſo, if he ſhould pay, or ſecure to aid, *&c.* And though the words *or unprovided for* there are out, this is but *vitium clerici*, and muſt be inſerted to make ree with the other parts of the deed; and then this proviſo to give him liberty to determine the term. which the plain- would now have ſold, for payment of the portion in his life- to any daughter which ſhould be unmarried, or not pro- d for, at his death; and as to the caſes on this head, he that in moſt of them, in which the term was decreed to be there were no conditions precedent either to the veſting of erm or execution of the truſt; and decreed accordingly. 1710. *Corbet* and *Maidwell.*

A ſettlement was made on the huſband for life, remainder wife for life, and to the firſt and other ſons in tail, and in

default of such issue, to trustees for 500 years, in trust, after t commencement of the term, to raise 4000 *l.* as portions for t younger children of the husband and wife, payable at twen one or marriage, by rents, profits, sale or mortgage; the fath died, leaving only a daughter, who married the plaintiff at teen; and it was held, that the portion should not be raised in life of the mother, nor that any interest should accrue for it d ing the mother's life, because the trust is to raise the porti after the commencement of the term, which must be intend when it comes into possession. *Trin.* 1718. *Butler* and *Dunc* 2 *Vern.* 760. *Quære of this case, for it seems to be ill reported.*

The *Quære* seems to have no foundation: *Vide* this Case fully reported, 1 *Will. Rep.* 448. accord'. 2 *Will. Rep.* 484. S C. and Decree. 2 *Equ. Abr.* 644. *pl.* 15. S. C.

7. A settlement was made in the usual form, with a limita to trustees, for want of issue male, to raise portions for daugh to be paid at twenty-one or marriage, which should first hap by and out of the rents and profits, or by mortgage or sale they should think fit; and in the mean time, and till the portions should become payable, the trustees to raise 100 *l.* *Ann.* for the maintenance of each of them; the father died, one of the daughters having married the plaintiff, this bill brought to have the portion raised, but was dismissed, bec the portion being to be raised out of the rents and profits, o mortgage or sale, plainly shewed that it was not to be raise such time as the trustees might make use of the election them by the settlement, to raise it either out of the rents profits, or by mortgage or sale; but during the life of the ther, who had it in jointure, they could not raise it out o rents and profits; therefore neither by mortgage or sale, were all inserted in one and the same clause, and a discreti power lodged in the trustees, to use either the one way o other; and till they had the election of using either of ways, they had no power at all; besides that, the mainte being to precede the raising of the portions, if there w maintenance to be raised in the mother's life-time, the po were not to be raised in her life-time, as they were not to place till after the maintenances; and my Lord Chancello the Master of the Rolls both said, that the cases on this had gone too far already, and mangled all estates, and tha would never decree portions to be raised in the father's life where it could possibly bear any other construction; an decree was affirmed in the house of lords. *Mich.* 1728. and *Berkley.*

The first reason (that of a necessity of having an Election by the words Rents, Profits, Sale or Mortgage) may be equally objected to all the Cases on this head: nay, these very words are what the advocates for the portions chiefly insist on; that reason therefore seems not to have been ever deem'd of great force; P. Williams makes no mention of it in his report of this Case, but entirely rests all the arguments on the necessity maintenance being preceding to the raising the portion itself: To avoid a palpable ab and also because one of the contingencies on which the raising of the portions depe not happened, and that the Father had a power of revocation which may yet tak any time before the raising the portion, and because the portion by the expres word settlement was not to be raised "until it conveniently may" which could not be int the Father's lifetime.

CAP. XLIV.

Power.

(A) *Power, when well created, and when determined.*
(B) *Of the right Execution of a Power, and where a Defect therein will be ſupplied.*

(A) *Power, when well created, and when determined.*

IF a man gives inſtructions to put his will in writing, and that his meſſuages, *&c.* ſhould be ſold by *A.* and *B.* for payment of his debts and legacies, and dies; and after dies, *B.* and the heir at law will be compelled to ſell. *Vid.* 204.

So if lands are deviſed to be ſold, and no perſon is named that purpoſe, the heir muſt do it. 1 *Chan. Ca.* 177. 1 *Rep.* 283. S. P.

If truſtees are impowered to pay portions at prefixed days, of the rents and profits of lands, and the rents and profits not amount to the ſums to be paid, they may ſell the lands. *Chan. Ca.* 175. 2 *Vern.* 1, 2. S. P.

If a man has power to charge land with any ſum, not exceeding the ſum of 3000 *l.* he may charge it with 3000 *l.* and interbeſides; for the intention is to charge the premiſſes with 3000 *l.* principal money, and that of courſe carries intereſt, and one would lend ſuch ſum on ſuch ſecurity, if the law were otherwiſe. *Paſch.* 12 *Ann. Lord Kilmurry* and *Geery*, 2 *Salk.* 538. *in Canc.*

A man makes a ſettlement on the marriage of his ſon with *B.* and *(inter al')* there is this *Proviſo*, provided that if the *B.* ſhall happen to ſurvive her huſband, not having iſſue, or but iſſue of their bodies, lawfully begotten between them, *B.* to have power to ſell and diſpoſe of ſuch lands; the and dies having iſſue; ſome years after that iſſue dies without and then the wife ſells thoſe lands; and it was held that her power *Holt* and *Burley.* 2 *Vern.* 651. S. C.

power took effect, tho' the husband did not die without issue at the time of his death. *Pasch.* 1710. *Holt* and *Bureigh*, 2 *Vern.* 651.

Prac. in Chan. 474. S. C. and Decree; and adds, that this Case was agreed *(in Dom' Proc.)* to be intirely a new Case; and that it was very elaborately argued on both sides. 1 *Co.* 173. 1 *Vent.* 198. 2 *Vez.* 211. 2. *Burr.* 1136.

6. A man makes a settlement, wherein was a power, that he might from time to time, by deed or writing under his hand and seal, revoke the use thereof, and by the same, or any other deed, limit and declare new uses: in pursuance of this power, he revokes the old uses, and by the same deed limits new uses without annexing any new power of revocation to those new uses; afterwards thinking he had, by virtue of the first settlement, a power of revocation *toties quoties*, he by another deed revokes the last uses, and again declares other uses of the same lands; and if he had such power, was the question. It was agreed he might in the deed of revocation have annexed a power of revoking the uses thereby declared, and might afterwards have executed that power accordingly; but in this case there being no such new power of revocation annexed to the new uses, 'twas decreed that his power of revocation by the first deed was executed, and at an end, and by consequence that the revocation afterwards was without any warrant, and so the uses limited upon the first revocation must stand; and this decree was affirmed in the house of peers. *Trin.* 1717. *Heli* and *Bond.*

(B) *Of the right Execution of a Power, and where Defect therein shall be supplied.*

Cro. Jac. 318. 3 *Bac. Ab.* 416. 1 *Ld. Raym.* 269. *Powell* on *Powers*, 411. *Cowp.* 260. 266. 714. *Doug.* 53, 293, 565. 1 *Term. Rep.* 705. 2 *Term. Rep.* 241. 380. 781.

1. IF one hath power to make a lease for ten years, and he makes a lease for twenty years, yet in equity this is good for ten years of the twenty, and so has been settled several times. *Trin.* 15 *Car.* 2. *Parvey* and *Bowen*, 1 *Chan. Ca.* 23.

2. One having a power to make leases for twenty-one years in possession, made a lease to *A.* for twenty-one years, in trust for the payment of debts; but the lease was made to commence from a time to come, and so not pursuant to the power; yet being made for the payment of *(a) Debts*, was supported in equity. *Pollard* and *Green*, 1 *Chan. Ca.* 10. 1 *Chan. Rep.* 185. S. C.

(a) Tenant for Life, with power to make leases for twenty-one years, rendering the antient rent, makes a lease for twenty-one years, to begin such a day after; this is not pursuant to the power, and consequently void, because it is a future lease which this power does not warrant; for if he might make it in reversion, or *in future*, though but a month after, he may as well make it to begin twenty years after, or after his death, and so defeat the intent of the power, which being to charge the estate of a third person, is to be taken strictly; and to this purpose are several cases *Palm.* 468-9. *Cro. Eliz.* 5. 6 *Co.* 33. 1 *Leon.* 35. 3 *Leon.* 130. 4 *Leon.* 64. *Moor* 1 *Poph.* 9. *Yelv.* 222. *Cro. Car.* 318. 2 *Roll. Abr.* 261. *Raym.* 247.

* 3. A man made a voluntary settlement on his son for life and after to his first and other sons in tail, with power for the to make a lease in possession for ninety-nine years, determinable three lives, and also to make leases for sixty years to commence after his death, if he had issue male, to continue so long as he issue male; the son makes a lease to his father in trust for of his younger children; but the lease was not pursuant to power; yet it was decreed good, and taken to be as a lease made by the father after a voluntary settlement. *Mich.* 1698. *Good* and *Gooding.*

4.

4. But where a reverſioner upon an eſtate for life made a ſettlement on herſelf for life, with power for her being ſole, to make leaſes for three lives in poſſeſſion; and ſhe and her huſband, in the life-time of the tenant for life, made a leaſe for twenty-one years, *habend.* from the date; and it was held not purſuant to her power; for by the marriage ſhe puts herſelf in the power of her huſband; and my Lord Keeper took a diverſity between a naked power, and a power which flows from an intereſt; for where a bare power is given to a feme by will to ſell lands, altho' ſhe afterwards marries, ſhe may ſell the lands, and may ſell to her huſband; but where a feme, upon a ſettlement of her own eſtate, reſerves a power which flows from an intereſt, that power ought to be executed by the feme whilſt ſole; and yet he ſaid, ſuch power ought to be taken liberally, tho' formerly they were taken ſtrictly. *Hil.* 15 *Car.* 2. *The Marquis of Antrim* and *the Duke of Buckinghaw*, 1 *Chan. Ca.* 17.

5. *A.* on the marriage of his eldeſt ſon *B.* makes a ſettlement of certain lands on *B.* for life, remainder to his firſt, ſecond and third, *&c.* ſons in tail, remainder to *C.* a ſecond ſon for life, and to his firſt, *&c.* remainder to himſelf in fee, with a power to *B.* and *C.* ſeverally as they ſhall come into poſſeſſion, to make leaſes for three lives, or twenty-one years, or any number of years determinable in three lives, in this manner. Firſt, *Of all or any of the lands anciently and accuſtomably demiſed, whereof fines have been uſually taken, reſerving the ancient, uſual and accuſtomable rents or more.* Secondly, *Of all the other lands, reſerving the moſt improved rents that can be got*; and that the tenants ſhould ſeal and execute counterparts of their leaſes; *B.* died without iſſue, *C.* entered, and being ſeiſed with a ſudden ſickneſs, when he had no rent-rolls, or old leaſes to guide him, taking notice of his power generally, executes two leaſes; one of the lands not anciently or accuſtomably letten, and thereon reſerved the *beſt improved rent*; and on the other reſerved the ſeveral *ancient and accuſtomable rents*, but does not ſpecify what thoſe rents are, and died; and it was held clearly by Lord *Cowper*, *Holt* and *Trevor*, ch. juſtices, that the firſt leaſe was void, and not warranted by the power; nothing being ſo uncertain as what ſhall be ſaid the moſt improved rent; and Lord *Cowper* and *Trevor* againſt *Holt* held, that the ſecond leaſe was void alſo for uncertainty, and the inconveniency he in remainder or reverſion would be put to, in not being able to avow for the rent with exactneſs; by which means he may be nonſuited, and ſo prevented of having any benefit of the lands; and tho' a court of equity may decree ſuch a leaſe good between the leſſor and leſſee, yet as there appears no conſideration in this caſe, it is not proper that the court ſhould interpoſe in ſupplying a defect, and thereby lay a charge on the right of a third perſon. *Hil.* 1705. *Orby* and *Lady Mohun*, 2 *Vern.* 531, 543.

Prec. in Chan. 257. S. C. under the name of *Orby* and *Lord Mohun*, *Gilb. Eq. Rep.* 45.

6. *J. S.* having four children, *viz.* two ſons and two daughters, ſettles his eſtate on truſtees, to the uſe of himſelf for life, remainder to his wife for life, and after their deceaſe, to the uſe and uſes of ſuch child and children, and in ſuch ſhares and proportions, as he ſhould appoint by any writing by him to be ſigned in the preſence of two witneſſes; and in default of ſuch appointment, to his eldeſt ſon in tail; he by his will by him ſigned, and

atteſted

atteſted by ſeveral witneſſes, deviſes a rent-charge out of thoſe lands to his youngeſt ſon, and to the firſt and other ſons of his body ſucceſſively in tail; and further wills, that in caſe his ſaid ſon die without iſſue male, ſo as the eſtate ſhould come to his eldeſt ſon, then he to pay 500*l.* a-piece to his daughters; the ſon dies without iſſue; and the bill was brought by the daughters to have the 500*l.* a-piece, according to the will; the eldeſt ſon by way of plea let forth the deed of ſettlement, and power *prout*, and inſiſted, that the power was not well purſued or executed by the will; (to wit) that the teſtator might have diſtributed the land amongſt his children in ſuch proportions as he thought fit, but had not power to grant or deviſe a rent-charge or ſums of money, as he had taken upon him by his will to do; but the court diſallowed the plea, and ordered him to anſwer the bill. *Trin* 1688. *Thwaytes* and *Dye*, 2 *Vern.* 80.

7 If *A.* on his marriage conveys land to a truſtee, to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs of their bodies, remainder to *A.* in fee; *Proviſo* that in default of iſſue of the marriage, the truſtee ſhall convey to ſuch uſes as the ſurvivor of the huſband or wife ſhall appoint; altho' the huſband deviſes the land, and dies firſt without iſſue, yet the wife has a good power of diſpoſing of the eſtate by her appointment. *Trin.* 1700. *Biſhop of Oxon* and *Leighton, & al'*, 2 *Vern.* 376.

8. *A.* by a marriage ſettlement is tenant for life, remainder to truſtees to raiſe 4000*l.* for younger childrens portions, as *A.* ſhould appoint, remainder to his firſt, &c. ſons in tail. *A.* having ſeveral children, appoints the 4000*l.* amongſt his younger children, and particularly 2600*l.* thereof on *B.* his ſecond ſon, who was then under a treaty of marriage; the eldeſt ſon died ſix years afterwards, whereby *B.* became eldeſt ſon, and intitled to the whole eſtate after his father's death; and thereupon *A.* made a new appointment of the 2600*l.* amongſt his other younger children; and it was held, that tho' *B.* was a perſon at the time capable of taking within the power of appointing, yet it was upon a tacit or implied condition, that he ſhould not afterwards happen to become the eldeſt ſon, and that this was a *defeazable* appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the perſon; and decreed accordingly *Hil.* 1705. *Chadwick* and *Doleman*, 2 *Vern.* 528.

9. On a marriage-ſettlement 2500*l.* was provided for the iſſue of the marriage, in ſuch proportion as the huſband ſhould appoint; he died leaving only a daughter, and made no appointment, and the 2500*l.* was decreed her. *Mich.* 1710. *Davy* and *Hooper*, 2 *Vern.* 665.

10. If a man gives legacies to his children to be paid at twenty-one or marriage, and if any of them dies before twenty-one or marriage, the legacy of ſuch child to be diſpoſed to *one* or more of the children then living, in ſuch manner as his wife, whom he made executrix, ſhould think fit; and one of the children dies under age and unmarried; the mother may appoint ſuch legacy to any *one* of the other children, and it will be good. *Mich.* 1705. *Thomas* and *Thomas*, 2 *Vern.* 513.

11 But if an executor has a general power to diſtribute a ſum of money amongſt children at diſcretion, and he makes an unreaſonable

ſonable or indiſcreet diſpoſition, it will be controlled in a court of equity. 2 *Vern.* 513. *per Curiam.*

12. So where a man having two daughters, one by a former wife, and another by a ſecond wife, deviſed his eſtate to his wife, to be diſtributed between his daughters, as his wife ſhould think fit; and ſhe having given 1000 *l.* to her own daughter, and but 100*l.* to the other, the court decreed an equal diſtribution. *Cragrave* and *Perroſt*, 1 *Vern.* 355.

13. *A.* deviſed his perſonal eſtate, and 400*l.* to be raiſed out of a truſt eſtate, to be diſtributed by two of his daughters, his executrixes, amongſt themſelves and their brothers and ſiſters, according to their need and neceſſity, as they in their diſcretion ſhould think fit; and my Lord Keeper decreed the heir at law a double ſhare thereof, as looking upon him as ſtanding moſt in need thereof; which decree was affirmed in the houſe of lords. *Paſch.* 1701. *Warburton* and *Warburton*, 2 *Vern.* 421.

14. If a man makes a ſettlement of his eſtate on his eldeſt ſon in tail, with a power by deed or will, under ſale to charge the lands with any ſum not exceeding 500*l.* and he prepares a deed, and gets it ingroſſed, by which he appoints the 500*l.* to his younger children, and dies before it is ſigned or ſealed; yet this ſhall amount to a good execution of his power in equity, the ſubſtance being performed. *Mich.* 27 *Car.* 2. *Smith* and *Aſhton*, 1 *Chan. Ca.* 264.

Rep. Temp. Finch 273. S. C. ſays, the perſon prepared notes in writing, which he declared ſhould be the effect of his laſt will, and which were (as he called them) inſtructions for counſel to draw up his laſt will in form. Upon a trial directed out of Chancery, a verdict was found for the will: and Lord Chan. declared there was a good execution of the power, and that the notes were a clear demonſtration of his intention.—1 *Freem.* 308. S. C. ſtates it, that *A.* made a voluntary conveyance to the uſe of himſelf for life, reſerving a power to make a diſpoſal of any part of it by writing under his hand and ſeal, and then makes a diſpoſal by will without putting to his ſeal; and *Finch* Lord Keep. gave his opinion ſolemnly, that this was a good execution of his power. —3 *Keb.* 551. S. C.—3 *Salk.* 277. S. C. *pl.* 6. and mentioned as a will.

15. *A.* by ſettlement intailed his eſtate, with power of revocation by any writing publiſhed under his hand and ſeal, in the preſence of three witneſſes; the land deſcended to his ſon, who mortgaged it to *J. S.* who brought his bill to foreclоſe; and it appearing that *A.* had by his will, wherein he recited his power, declared that he revoked the ſettlement, tho' but two witneſſes who ſigned, but another preſent; yet Lord Chancellor decreed, that the mortgage-money ſhould be paid, and ſaid, that in ſtrictneſs here was a good execution of the power, a third witneſs being preſent, tho' he did not ſign his name; and if there had not, yet it was proper that ſuch a little circumſtance ſhould be helped in equity. *Hil.* 32 *Car.* 2. *Sayle* and *Freeland*, 2 *Vent.* 350.

Vid. 2 *Freem. Rep.* 63. 2 *Equ. Abr.* 671. *pl.* 2.

16. Tenant in tail with power to make a jointure of lands in the counties of *A. B.* and *C.* remainder in tail to *J. S.* marries and receives 3000*l.* portion with his wife, and by articles before his marriage covenants to ſettle a jointure, but dies before any ſettlement was made; the wife dies, and her executrix brings a bill to have an account of the profits of the lands, which by the articles were covenanted to be ſettled in jointure againſt the remainder-man, who had upon his marriage ſettled thoſe lands upon his wife and her iſſue, but with notice of the power in the firſt tenant in tail to make a jointure; and my Lord Chancellor diſmiſſed the bill, there being no equity for the executrix of the firſt jointreſs againſt the ſecond and her iſſue, who was equally a purchaſer with the firſt. *Mich.* 1686. *Elliot* and *Hele.* 1 *Vern.* 406. 2 *Chan. Ca.* 29, 30, 87. S. C. *bu two reſolution.*

17. But

17. But where *A.* tenant for life, with power to make a jointure of 1000*l. per Ann.* upon his marriage covenanted to make a jointure on his wife of 1000*l. per Ann.* and pursuant thereunto a settlement was made, and a particular of lands, which were mentioned to be worth 1000*l. per Ann.* was set out for the jointure, but in truth fell short, and were not above 600*l. per Ann.* and on the jointress's bill, the court decreed the jointure to be made up 1000*l.* against the issue in tail, though it was urged, that he was not privy to the marriage-treaty, nor guilty of any fraud. *Trin.* 1700. *the Lady Clifford* and *Lord Clifford*, 2 *Vern.* 379.

* 18. Sir *Edward Gold*, the plaintiff, and his lady, intermarried in 1683. and some years after the marriage an estate of inheritance of about 100*l. per Ann.* descended to the lady; whereupon she and her husband, by indenture, assigned and conveyed this estate to trustees and their heirs, in trust to permit the lady from time to time, notwithstanding her coverture, without her husband, and not to be subject to his power or controul, to apply and dispose of the rents, issues and profits thereof, as she should by any writing under her hand and seal, in the presence of two or more witnesses, direct and appoint, with a power likewise for the trustees to make such sales, mortgages, or other conveyances of the lands themselves, as the lady should in like manner direct and appoint: the lady, by parcimony and frugality had, in about twenty-two years time, saved about 1400*l.* out of this her separate estate, 790*l.* whereof she had invested in *East-India* bonds, 200*l.* in twenty lottery-tickets, and had the residue in ready money and broad pieces; the defendants were her nieces, for whom (having no children) she had a very great regard and love; and having given them, with her husband's privity, four of the bonds, she lodges the other three in the trustees hands, taking their note for the delivery of them, and afterwards directs the trustees to deliver the other three to whomsoever should bring their note, and then gives the note to one of the defendants, who thereupon by her orders, goes to the trustees, and gets up the three bonds from them; and those bonds the lady told her nieces, she intended should be theirs after her death, but that she expected to have the interest arising thereby during her life; she afterwards, some short time before her death, delivers likewise to one of her nieces a canister, wherein were 400 *guineas*, and several broad pieces of gold, telling her, she intended that to be divided between her and her sister, after her death; and likewise directed the trustees to divide the twenty lottery-tickets between her nieces, after her death. All this transaction was only by word of mouth, without any writing whatsoever, but was fully proved in the cause. In 1712. the lady *Gold* died, and Sir *Edward*, her husband, having taken out administration to his lady, brought his bill against the defendants, to have an account and delivery up of the *East-India* bonds, and of the money so delivered to them, and likewise against the trustees for the twenty lottery-tickets; and the nieces brought a cross-bill to establish their title to the money and bonds, and to have the twenty lottery-tickets delivered to them, according to the direction of my lady *Gold*. It was urged for Sir *Edward*, that this power to his lady to dispose of the profits of her estate, was not before marriage; that she was not a purchaser of it, but that being after marriage, and voluntary, it ought to be construed strictly; that these powers being in derogation of the rights of husbands, were not allowed at law; and tho' courts of equity had

ſupported them, yet that was only where the power was ſtrictly and literally purſued; that the defendants were neither children nor grandchildren, and but remotely allied to the lady; that though defective executions of powers had been ſometimes ſupplied in this court, for the ſake of a wife or children, or for the ſake of creditors, yet it was never yet carried ſo far as to aſſiſt ſtrangers; and that it was to be reſembled to the caſes of copyhold lands, where the want of a ſurrender had never yet been ſupplied, but in the three inſtances before-mentioned, or for charitable uſes; that circumſtances were frequently impoſed on the parties themſelves to prevent ſurprize; and that if theſe circumſtances were not purſued, a court of equity would not aſſiſt, eſpecially any perſon who claims by a voluntary diſpoſition; and ſo was the duke of *Albemarle*'s caſe, where the revocation was to be in the preſence of ſix witneſſes, where three were to be peers; yet that circumſtance could not be aided; that for ſmall trifling ſums they agreed it was not neceſſary the lady ſhould make a writing under her hand and ſeal atteſted according to her power, but for ſuch conſiderable ſums as theſe were the power muſt be purſued, or elſe the diſpoſition would be void; that in this caſe, if the lady had made a will in writing, unleſs atteſted by two witneſſes, it would not have been good, much leſs this parol diſpoſition, and conſequently the huſband intitled to them as adminiſtrator to his wife. On the other ſide it was inſiſted, that it was a ſtrange doctrine to advance, that the wife in this caſe muſt be bound ſtrictly to purſue the power, when ſhe had the money in her own hands; that the intent of that power was only in caſe ſhe had diſpoſed of it to any other perſon, whilſt it remained in the truſtees hands, before ever ſhe had received it; that it could not be pretended but that the truſtees might pay it to herſelf, without any ſuch writing; that they had ſo done in this caſe, and that ſhe was then at liberty to have ſpent it, or to give it away, as ſhe thought fit; that it was hard to ſay, ſhe had a power over it whilſt in the truſtees hands, and yet that, as ſoon as ſhe received it herſelf, and conſequently as ſoon as it became uſeful to her, that then it ſhould be the huſband's, unleſs ſhe purſued her power; that if ſhe had taken up clothes or goods of any tradeſman, ſurely it would not be pretended, but that ſhe having the money in her own pocket, might pay them without any ſuch writing under her hand and ſeal; that therefore the caſes cited were not to the purpoſe; for here the money being in her own hands, ſhe was at liberty to give or diſpoſe of it as ſhe thought fit; that the direction to the truſtees to deliver theſe tickets to her nieces, after her death, was a kind of *donatio cauſa mortis*; and that as ſhe, being in poſſeſſion of them herſelf, might have given them to her nieces; ſo ſhe might direct her truſtees afterwards, when they had them by her delivery. Lord Chancellor ſaid, there was no difference in theſe caſes, whether the power were given before marriage, or after; for if the diſpoſition is to take place in virtue of this power, it muſt be ſtrictly purſued in either caſe; that he thought it ſhould rather be taken more liberally, when given after, than when before marriage; for then the huſband could be ſuppoſed to be under no temptation of giving it, as he might before marriage, in hopes of prevailing on his wife after, to give it up, or relinquiſh it; that therefore it muſt be intended he fully deſigned ſhe ſhould have the benefit of it;

that

that the reaſon why the will of a feme covert was not good, was not for want of power in the wife; for if the huſband conſented, the ſame inſtrument which ſhe executed as her will would be ſufficient to paſs it, and it would go out of her property; that ſhe having in this caſe received the money, had abſolute power to diſpoſe of it as ſhe thought fit; that ſhe might have given it away abſolutely, or upon terms; that if, as it was agreed, ſhe might diſpoſe of little ſums, why not of great ones? where was the difference, where muſt the bounds be ſet; that by this power ſhe was made in the nature of a feme ſole; and as ſuch a diſpoſition in that caſe would have been good, why not in this? her adminiſtrator in that caſe could not have impeached ſuch a diſpoſition; no more can her huſband in this, who has no other right but as adminiſtrator; that the diſpoſition by her was perfect and compleat; that the reſerving the intereſt to herſelf during life, bound indeed the party, but did not defeat the gift; that it was in her power to give it on what terms ſhe pleaſed, and either preſently, or at a future time, and that her death made no difference in the caſe; and as ſhe might have paid any tradeſman's bill without ſuch writing, ſo ſhe might diſpoſe of the whole, or of part, in the ſame manner; and ſo decreed the whole 1400 *l.* to be well diſpoſed of to the nieces, in regard the money being paid to her, was abſolutely in her own diſpoſal. *Paſc.* 1719. *Gold* and *Rutland*.

2 *Will. Rep.* 222.—— *Lucas's Rep.* 463.—— 2 *Mod. Ca. in Law and Eq.* 12.—— *Gilb. Eq. Rep.* 160. and at the End of *Max. in Eq.* S. C. *S. C.* 2 *Eq. Rep.* 660. *pl.* 8. *Gilb. Cha.* 285. 1 *Stra.* 596.

19. *A.* deviſed his lands to *B.* his eldeſt ſon for life, remainder to his firſt and other ſons in tail male, remainder to his ſecond and third ſons in like manner, with power to every perſon who ſhould, by virtue of the will, be ſeiſed of the lands by any writing indented under his hand and ſeal, to ſettle a jointure on his wife of 500 *l. per ann.* provided ſuch wife ſhall have a fortune equivalent to ſuch jointure, and died; *B.* entered, and on treaty of marriage with the plaintiff, covenanted in conſideration of 10000 *l.* marriage-portion, that he or his heirs would, after the marriage, at his own coſts and charges, according to the power given him by his father's will, or *otherwiſe*, by good conveyances, ſettle lands of 500 *l. per ann.* upon the plaintiff, for her jointure, to commence in poſſeſſion immediately after his death, if ſhe ſurvived him; the marriage took effect; afterwards *B.* got a ſettlement made and ingroſſed purſuant to his power and the marriage covenant, but by various accidents was prevented from ſigning the deed; and being taken ill died ſuddenly, not having the deed by him, and having expreſſed (as was fully proved) great uneaſineſs at its not being perfected, and left the plaintiff by his will (which he had made ſome time before) a legacy of 300 *l. beſide what is ſettled on her by the marriage-articles*; and it was decreed by my Lord Chancellor, aſſiſted with the Maſter of the Rolls, and Mr. Baron *Price* and Mr. Baron *Gilbert*, that this defective execution ſhould be ſupplied in equity, ſo as to bind the eſtate in the hands of the remainder-man; although it was objected, that ſhe had a remedy by the covenant againſt the heir and executor of the huſband; and that, by the words in the covenant, he was at liberty to make a different proviſion for her. *Paſch.* 1724. the Earl of *Coventry's* caſe.

CAP.

CAP. XLV.

Privilege.

(A) *What Perſons are intitled to Privilege.*
(B) *Of Proceedings by, or againſt a privileged Perſon.*

(A) *What Perſons are intitled to Privilege.*

1. A Member of the convocation is to be allowed the ſame *(a)* privilege with a member of parliament. 3 *Chan. Rep.* 38.

(a) This is expreſsly enacted by the *Stat.* 1 *H.* 6. *cap.* 1.

2. The widows of peers ought to have no privilege, becauſe they are not to be called to counſel; but they are to have privilege of peers, not to be arreſted; declared by my Lord Chancellor *Finch* to have been ſo reſolved in parliament, 19 *Dec.* 1676. 2 *Chan. Ca.* 224.

3. Two of the defendants, being the officers of the *Exchequer*, plead the privilege of the *Exchequer*; but the plea was overruled; becauſe there was a third defendant, who had no right of privilege. 1 *Vern.* 246.

(B) *Of Proceedings by, or againſt a privileged Perſon.*

1. IF a member of parliament ſues at law, and a bill is exhibited in chancery to be relieved againſt that action, the court will make an order to ſtay proceedings at law till anſwer, or further order, although the court will not proceed againſt a member who has privilege of parliament. 1 *Vern.* 322.

2. The court granted an injunction againſt a member of parliament, but at the ſame time ordered that no attachment ſhould be taken out. 3 *Chan. Rep.* 21.

3. The plaintiff having brought a bill to redeem an old mortgage againſt the defendant, who was then an *ambaſſador* at the court of *Spain*; the defendant obtained an order, that all proceedings ſhould ceaſe until his return from his *embaſſy*; the plaintiff moved to diſcharge the order; and upon debate it was agreed a *protection* lies for an *ambaſſador*, *quia profecturus* or *quia moratus*,

rus, and may at law caſt an eſſoign for a year and a day, and may afterwards renew it, if the occaſion continues; and in this caſe the court ordered a ſtay of proceedings for a year and a day from this time unleſs the defendant ſhould ſooner return into *England*. 2 *Vern.* 317.

2 *Will. Rep.* 452. S. C. ſays, Plaintiff's Proceedings were to ſtay until he with a Surety gave Bond in 40*l.* Penalty for anſwering Coſts. 2 *Vez.* 24, 557.

4. The plaintiff, being protected by the *Genoeſe* ambaſſador, was ordered, though after an anſwer put in, to give ſecurity to anſwer the coſts in the ſame manner as if he were a foreigner; becauſe by the 7th of *Ann.* all proceſs againſt ambaſſadors, and their ſervants, are made void; ſo that if the bill ſhould be diſmiſſed, no proceſs could iſſue againſt him; and a precedent was produced the 25th of *July* 1709, *Barret* and *Buck*, where the like order was made by my Lord *Cowper*; and that caſe was likewiſe after anſwer was put in. *Paſch.* 1729. *Goodwin* and *Archer*.

CAP. XLVI.

Proceſs.

(A) *Of iſſuing, ſerving and returning a Proceſs, by, and againſt whom, at what Time; and here of Contempts.*

(B) *Of Sequeſtrations.*

Of Injunctions, *vide* Title *Injunction*.

(A) *Of iſſuing, ſerving and returning a Proceſs, by and againſt whom, at what Time; and here of Contempts.*

1. IF a cauſe has ſlept twelve months in court, there ſhall be no proceedings had upon it, without firſt ſerving a *ſubpœna ad faciendum attornat'*. 1 Vern. 172.

2. If a man is arreſted upon an attachment, the contempt ſhall hold good, tho' no affidavit be filed at the time of taking forth the attachment, if it be filed before the return of it. 1 *Vern.* 172.

3. If

3. If one be taken up on an attachment, either in proceſs or in execution after a decree, yet in both caſes, on his appearing before the regiſter, he is to be diſcharged, and to anſwer the interrogatories at large, not in cuſtody; and if he be continued in cuſtody, the court on motion, and appearing before the regiſter, will diſcharge him. *Hil.* 1700. *Danby* and *Lawſon*. *Pret. in Chan.* 110. S. C. and P.

4. So if the ſheriff take one up on attachment in proceſs, he is to give a bond of 40 *l.* penalty to the ſheriff, to appear and anſwer; but for one taken up in execution after a decree, the ſheriff may inſiſt on ſecurity proportionable to his duty; but in both caſes, on the regiſter's certificate that the party has appeared, the ſheriff is to deliver up the bond; agreed to by the regiſters, and ruled by the Maſter of the Rolls. *Hil.* 1700. *Danby* and *Lawſon*. *Ibid.* S. C. and P. *Prac. Reg.* 21.

5. The plaintiff obtained an order, that ſervice of proceſs to appear at the defendant's laſt place of abode, ſhould be deemed good ſervice, and left the ſame at the houſe where he lodged, and carried on the proceſs to a ſequeſtration, and then brought on the cauſe againſt the other defendant; who inſiſted that if the plaintiff ought to be relieved againſt him, he ought to have a decree over, againſt the other defendant; and therefore he was concerned to ſee that the proceeding was regular, and inſiſted, that it being above twelve months ſince the other defendant had left that lodging, the ſervice was not good; and of that opinion was the court. 2 *Vern.* 369.

6. If after proceſs of contempt, the defendant put in an inſufficient anſwer, and ſo reported, the plaintiff ſhall not, as formerly, begin the proceſs at the *ſubpœna*, but ſhall go on to the attachment with proclamation, and other proceſs, as if the anſwer had not been put in. 1 *Chan. Ca.* 238.

* 7. A diſtinction was taken by the *Solicitor General*, and agreed to by the court as reaſonable and agreeable to the meaning of the printed orders of the court, that if proceſs to a meſſenger, or any other proceſs of contempt, has gone out againſt a defendant for want of his anſwer, that on tender of the coſts of thoſe contempts, if the plaintiff accepts them, and the anſwer, on looking into it, appears to be inſufficient, ſo that the plaintiff takes exceptions, and the defendant is obliged to put in a further anſwer; that in order to compel the defendant to put in ſuch further anſwer, if not put in in time, the plaintiff muſt begin all proceſs *de novo*, and go on with it regularly, becauſe his acceptance of the coſts was a remiſſion of all former contempts, and purged them; but as an inſufficient anſwer is really no anſwer at all in the judgment of the court, if he refuſes to accept the coſts, and the anſwer being put in on exceptions taken to it, it is reported inſufficient, he may go on with the proceſs where he left off, to compel putting in a further anſwer, without beginning *de novo*, as in the other caſe. *Trin.* 1728. *Haiſtwell* and *Grainger*.

8. Proceſs iſſued againſt the defendant till proclamation returned, then came a general pardon; and the defendant appeared and demurred to the bill, which the plaintiff moved to ſet aſide, becauſe though the contempt was pardoned, yet the delay was a loſs to him; but the court ordered them to proceed on the demurrer; for by the pardon the defendant ſtands *rectus in curia*. *Anon. Mich.* 28 *Car.* 2. 1 *Chan. Ca.* 238.

9. Upon

9. Upon a motion for a *Serjeant at Arms*, on a commiſſion of rebellion returned, it was held that by the king's demiſe every proceſs of contempt not executed is determined, ſo that the party muſt begin again at an attachment; but where any proceſs is executed, and a *cepi corpus* returned, there the proceſs ſtands good. 1 *Vern.* 300.

10. But when an attachment was ſued out in the time of king *Charles* the ſecond, and executed three days after his demiſe, but before notice of his death; and it was adjudged to be well executed, and the proceedings thereon regular. 1 *Vern.* 400. *Q.*

(B) *Of Sequeſtrations.*

1. IF a defendant is in contempt, and in priſon for not performing a decree, the court will order a ſequeſtration againſt his real and perſonal eſtate. 2 *Chan. Rep.* 151. Of the antiquity of ſequeſtrations, and that they are proper and neceſſary proceſſes, *vide* 1 *Chan. Ca.* 92. 1 *Vern.* 421.

2. Upon an affidavit that the defendant was gone into *Holland* to avoid the plaintiff's demand againſt him; and he having been arreſted on an attachment, and a *cepi corpus* returned by the ſheriff, the court, upon motion, granted a ſerjeant at arms againſt him; and upon the return thereof granted a ſequeſtration. 1 *Vern.* 344.

3. A ſequeſtration, that iſſues as a meſne proceſs of the court, will be diſcontinued and determined by the death of the party; but where a ſequeſtration iſſues in purſuance of a decree, and to compel the execution of it, there, tho' the ſame be for a perſonal duty, it ſhall not be determined by the death of the party. 1 *Vern.* 58. *Q.* 1 *Vern.* 118, 166.

4. A ſequeſtration binds from the very time of awarding the commiſſion, and not only from the time of executing it, and its being laid on by the commiſſioners; for if that ſhould be admitted, then the inferior officer would have *Ligandi & non Ligandi poteſtatem.* 1 Vern. 58.

5. The party who takes out a ſequeſtration, ſhall not be anſwerable for the acts of the ſequeſtrators, for they are the officers of the court; as if they have power to fell timber, and they fell to the value of 7000 *l.* and bring only 2000 *l.* into the account. 1 *Vern.* 160, 161.

6. Sequeſtrators on a meſne proceſs are accountable for all the profits, and can retain only ſo far as to ſatisfy for the contempts. 1 *Vern.* 248.

CAP. XLVII.

Purchaſe and Purchaſer.

(A) *Who is deemed a Purchaſer in Equity.*
(B) *Purchaſers, in what Caſes favoured in Equity.*
(C) *Where a Purchaſer, who purchaſes from one who has only a Power to ſell, muſt ſee that the Purchaſe Money is rightly applied.*

Of Purchaſers without Notice, and of preſumptive Notice, *vide* Title *Notice*.

(A) *Who is deemed a Purchaſer in Equity.*

1. LESSEE at a *rack* rent, though he paid no fine, is a *(a)* purchaſer, and ſhall avoid a voluntary conveyance. 2 *Vern.* 327.

(a) Though the word *Purchaſe*, in law, is of a very extenſive ſignification, and comprehends every ſpecies of acquiſition in contradiction to hereditary deſcent and eſcheat. *Lit ſect.* 12. Yet in equity a purchaſer is conſidered as a perſon, who innocently, without fraud or ſurprize, for valuable conſideration, acquires a right or intereſt, and is therefore ſo far favoured and protected, that his Title ſhall not be impeached in equity; no planks that he can lay hold on, and by which he can ſecure himſelf at law, ſhall be taken from him, neither ſhall he be compelled to diſcover any thing that will weaken his Title, *&c. Vide* Title *Notice* and *Bills of Diſcovery*, Title *Bill*, and 1 *Chan. Ca.* 36, 2 *Chan. Ca.* 48, 161, 252. 1 *Vern.* 27 2 *Vent.* 339. 2. *Vern.* 158, 159.

2. *A.* entered into partnerſhip in fifths, with three others, for twenty-one years, in digging for mines in *A.*'s lands, *A.* to have two fifths, and in conſideration of his ownerſhip of the land, to have a tenth out of the ſhare of the other partners, and they covenanted to bear profits and loſs in proportion; provided, if any one of the partners ſhould be minded to deſiſt, and ſignify ſuch his intention, and pay his ſhare of the charges and expences to that time, the agreement as to him, on his releaſing his intereſt to the reſt, to be void; purſuant to the articles they ſearched for mines, and after two years time, and the expence of about 120 *l.* they diſcovered a valuable mine, and worked for about the ſpace of three months, and then *A.* died, and his widow ſet

up a voluntary ſettlement made after marriage; and the court inclined, that the partners were as purchaſers, and that the voluntary ſettlement ſhould not ſtand againſt them. *Mich.* 1695. *Shaw* and *Lady Standiſh*, 2 *Vern.* 326.

3. If a man, in conſideration of a marriage-portion, ſettles a jointure on his wife, and makes a proviſion for the iſſue of that marriage, the wife and children are to be conſidered as purchaſers for valuable conſideration; and though the ſettlement was made after marriage, yet if it was made purſuant to articles entered into for that purpoſe previous to the marriage, it is the ſame thing; and the jointreſs, in ſuch caſe, ſhall avoid a prior voluntary conveyance, and ſhall not be obliged to diſcover writings, nor any thing elſe that may prejudice her, unleſs ſhe has her jointure confirmed to her. 1 *Chan. Ca.* 99. 1 *Vern.* 440, 479. 2 *Vern.* 701.

4. But if the ſettlement was made after marriage, and not purſuant to marriage-articles, it will be fraudulent againſt creditors, but it will be good againſt a ſubſequent purchaſer with notice, tho' not againſt one without; for the wife and children are to be conſidered more than mere voluntiers; but if the matter reſts barely in covenant or agreement, it will never be carried into execution againſt a ſubſequent purchaſer without notice, who has got a legal title, nor againſt a ſecond jointreſs without notice, who brought in a marriage-portion. *Vide* Title *Dower* and *Jointure*, letter (C). 1 *Vern.* 17, 217, 286. *Pract. Reg.* 21. *Finch. Prec. in Chan.* 98.

Prec. in Chan. 113. S. C. and Decree. 2 *Eq. ab.* 671. c. 1.

5. If a wife joins with her huſband in letting in an incumbrance on her jointure, and barring an eſtate in tail male, and they limit the uſes to the huſband for life, remainder to the wife for life, remainder to their two daughters; this does not make the daughters purchaſers, ſo as to ſhut out a judgment-creditor of the huſband's antecedent to the barring the eſtate-tail, for it is a voluntary gift from the wife to the huſband. *Trin.* 1700. *Ball* and *Burnford.*

(B) *Purchaſers, in what Caſes favoured in Equity.*

2 *Vern.* 159. S. C. cited.

1. A Purchaſer came into a man's ſtudy, and there laid hands on a ſtatute that would have fallen on his eſtate, and put it up in his pocket, and he having thereby obtained an advantage in law, tho' ſo unfairly, and by ſo ill a practice, yet the court would not take that advantage from him. Sir *John Fagg*'s caſe, cited 1 *Vern.* 52, 53.

2. If a releaſe be obtained from a grantee of a rent-charge, without any conſideration, and by fraud, yet a purchaſer will be admitted to take advantage of it. *Harcourt* and *Knowel*, 2 *Vern.* 159. cited to be adjudged, by *Rawlinſon* Lord Commiſſioner.

3. The plaintiff and defendant had each of them purchaſed a reverſion expectant on the death of tenant for life; the plaintiff brought his bill, that he might preſerve their teſtimony, and be admitted to try his title in the life-time of tenant for life; but for as much as the defendant was a purchaſer, the court could do nothing in it, and he loſt the land for want of examining his witneſſes.

Seybourne

Seybourne and *Cliſton*, 2 *Vern.* 159. cited by Lord Commiſſioner *Rawlinſon*. *Vide* 1 *Vern.* 354.

4. If a purchaſer buys in an old ſtatute or mortgage, tho' nothing be due upon it, yet he ſhall be admitted to defend himſelf by it at law; but for this *vide* how far a ſubſequent mortgagee ſhall defend himſelf by buying in a precedent incumbrance, Title *Mortgage*, and 1 *Vern.* 50, 187. 2 *Vern.* 29, 30, 81, 271.

5. * *A.* purchaſed the manor of *D.* in which were certain lands called *B.* and *P.* the manor, at the time of the purchaſe, was in mortgage for a term of years, and the mortgage was paid off, and the term aſſigned in truſt to attend the inheritance; afterwards *A.* upon the marriage of his ſon, ſettles part of theſe lands, and amongſt them the lands called *B.* and *P.* but no care was taken of the mortgage-term, that ſtood out; afterwards *A.* being in poſſeſſion contracts with the defendant to ſell him all the ſaid manor, except the lands called *B.* and *P.* but ſhews part of the lands of *B.* and *P.* as part that he would ſell, but the defendant did not know that any part of the lands were called by that name; and in the conveyance to the defendant there is an exception of lands called *B.* and *P.* After the purchaſe-money paid, the defendant was evicted of part of the lands called *B.* and *P.* (which he did not know by that name, for they had been ſhewn to him as part of his purchaſe, and he had paid for them) by the plaintiff, who claimed under *A.*'s ſon; upon which the defendant having found the old term that was on foot at the time of *A.*'s purchaſe, and got an aſſignment of it, upon which the plaintiff brought his bill to be relieved, and to have an aſſignment of the term; and that as to the lands called *B.* and *P.* he was no purchaſer of them, for they were expreſsly excepted in his conveyance. But my Lord Chancellor was of opinion, that theſe lands being ſhewn to the defendant as part of his purchaſe, and he not knowing them to be excepted by the name of *B.* and *P.* was in equity a purchaſer of them; and the court ought not to aſſiſt in defeating of them, and therefore diſmiſſed the bill as to all the lands purchaſed by him. *Mich.* 1698. *Oxwick* and *Brockett*.

6. *A.* on his marriage ſettled lands, which were intailed, on his wife for a jointure; his brother was privy to the marriage, and ingroſſed the jointure-deed, and concealed the intail; *A.* died without iſſue, having deviſed the lands to *J. S.* the brother recovered in ejectment; on a bill brought by the jointreſs and *J. S.* for relief, the brother confeſſed that he was privy to the marriage-treaty, and ingroſſed the jointure-deed, and that he had then the deed of intail in his hands, but did not mention his title, nor diſcover the antient deed of intail, becauſe he apprehended his brother would dock the intail; and the court decreed the jointreſs to hold and enjoy her jointure againſt the brother and all claiming under him, and a perpetual injunction againſt the judgment in ejectment; but as to *J. S.* who claimed the reverſion and inheritance by a voluntary deviſe, the bill was diſmiſſed; and this decree was affirmed in the houſe of lords. *Mich.* 1691. *Raw* and *Pole*, 2 *Vern.* 239.

7. So where a mother, who was abſolute owner of a term, was preſent at a treaty for her ſon's marriage, and heard her ſon declare, that the term was to come to him at his mother's death, and was a witneſs to the deed, by which the reverſion of the term

was ſettled on the iſſue of that marriage; and on a bill brought by the iſſue of that marriage, ſhe was compelled to make good the ſettlement, and to ſettle the reverſion of the term accordingly. *Trin.* 1690. *Hunſden* and *Cheyney*, 2 *Vern.* 150.

1 *Vern.* 136. 1 *Bac. Abr.* 598. S. C.

* 8. So where a younger brother, having an annuity of 100 *l. per ann.* charged on lands by his father's will, contracted with *A.* to ſell him this annuity; *A.* goes to *B.* the elder brother, and tells him he was about to buy this annuity of his younger brother, and deſired to know if his younger brother had a good title to it, and whether his father was ſeiſed in fee at the time of making the will, and whether the will was ever revoked; *B.* told him he believed his brother had a good title to it, and that he had paid him his annuity theſe twenty years; but withal, told him, that he heard there was a ſettlement made of his father's lands before the will, and that the ſaid ſettlement was in the hands of *J. S.* and that he had never ſeen it, and therefore could not tell him what the contents of it were, but incouraged him to proceed in his purchaſe, telling him, he had not only paid his brother his annuity to that time, but had paid his ſiſters 3000 *l.* under the ſame will; afterwards *B.* gets a ſettlement in his hands, by which the land out of which the annuity iſſued was intailed, and would thereby avoid this annuity: But on a bill by *A.* to have the annuity paid, or the purchaſe-money back again, the court decreed payment of the annuity, purely on the incouragement given by the elder brother. *Hil.* 1682. *Hobbs* and *Norton*.

9. *A.* poſſeſſed of a term for 100 years, in 1638 made his will, and *B.* who married his daughter, executor, and deviſed the term to his own wife; the executor aſſented, ſhe entred, and after three years died; after her death the executor entred and enjoyed the term till 1650, and then ſold it to one, who ſurrendred, and then took a new leaſe for 200 years, and laid out 250 *l.* in building on the premiſſes; *B.* died, and his wife ſurvived him till the year 1669. *J. S.* who married the daughter of *B.* being beyond ſeas twenty years, and not knowing of his title, came into *England* in 1670, and being informed of this whole matter, and of his title in right of his wife, took adminiſtration to the wife of *A.* and recovered by virtue of the term for 100 years in an ejectment; the purchaſer and builder exhibited a bill to be relieved againſt this dormant title: and *Grimſton*, Maſter of the Rolls, the poſſeſſion going ſo long, and divers purchaſers, and the laſt purchaſer under the new term having no notice of the old, or of the dormant title to the reſidue of the term of 100 years, adjudged the purchaſer ſhould be relieved, and hold the land till he was repaid his charges in building, diſcounting the profits received after the purchaſe, which *J. S.* perceiving, and that the value would not exceed 22 *l. per ann.* and that the reſidue of the old term was only for thirty-two years, he agreed (by advice of the Maſter of the Rolls) to take 80 *l.* of the purchaſer, and to releaſe his title to the old term. *Mich.* 27 *Car.* 2. *Edlin* and *Battaly*, 2 *Lev.* 152. *in Canc'.*

2 *Bac. Abr.* 598. *Gilb. Eq. Rep.* 85. *Hil.* 9 *Ann.* S. C. *in totidem verbis.*— *Vide* the laſt Caſe;

10. The plaintiff having a leaſe of certain mills for twelve years, which were near expired; the leſſor, on his marriage, makes a ſettlement of theſe mills to the uſe of himſelf for life, then to the firſt and other ſons of that marriage in tail male, remainder to his own

own right heirs; afterwards the plaintiff takes a new leaſe of theſe mills from the father for thirty years, and lays out 2800*l.* in new building and improving them; the defendant was the eldeſt iſſue male of the leſſor, and during the time the plaintiff was making theſe improvements, went to his father, and told him, he had no power to make any ſuch leaſe; that after his death the eſtate would be his, but never acquainted the plaintiff with this, or of the ſettlement made on his father's marriage; but on the contrary, writ to the plaintiff to take care to keep one of the mills in particular in repair; then the father dies, and the ſon recovers in an ejectment againſt the leſſee, who thereupon brought his bill to be quieted in the poſſeſſion of the mills during the reſidue of his leaſe, for that the defendant was fully acquainted with the circumſtances of this leaſe, knew his father had no power to make it, and yet never forbid or cautioned the plaintiff from going on with his repairs, but on the contrary ſtood by and ſaw them, and encouraged him in the proceeding therein; and therefore the plaintiff had a decree to hold during the reſidue of his term; for though the defendant was not privy to the making of this leaſe, but that was only the fraud of the father; yet he being to have the eſtate after his father's death, and taking notice thereof to his father, and that he had no power to make any ſuch leaſe, and yet ſuffering the plaintiff to go on in his repairs thereof, with a deſign to reap the whole benefit thereof when his father was dead, was ſuch a fraud and practice in him as ought to be diſcountenanced in this court, for *qui tacet conſentire videtur*; and *qui poteſt & debet vetare jubet.* And it was decreed that the plaintiff ſhould enjoy for the reſidue of his leaſe. *Paſch.* 1712. *Hanning* and *Ferrers.*

* 11. The plaintiff's wife, before her intermarriage with the plaintiff, being poſſeſſed of a term for years as executrix to her firſt huſband, and which was liable as aſſets to the payment of his debts, in order thereto, and to raiſe money for that purpoſe, the plaintiffs, after their marriage, entered into an agreement with the defendant, for ſale of the houſe in queſtion for the reſidue of the term, for 450*l.* whereof 210*l.* was to be applied in diſcharge of a mortgage thereon, to one *J. S.* and the remaining 240 *l.* was to be paid to the plaintiffs; accordingly the plaintiffs executed an aſſignment of the houſe to the defendant, with a receipt indorſed thereon for the whole purchaſe-money; but the defendant did not then pay the purchaſe-money, but gave a note for the payment of 210*l.* part thereof to *J. S.* the mortgagee, and of the remaining 240*l.* to the plaintiffs; and for the non-payment thereof the plaintiffs brought their bill to have a ſpecific performance, and payment of the money accordingly. The defendant, by his anſwer, admitted the whole caſe to be as above ſet forth, but inſiſted, that he ought not to be bound thereby, for that the plaintiff could not make him a good title, they having, by articles before marriage, agreed to ſettle this houſe for the benefit of themſelves and their iſſue, of which he had no notice at the time of his purchaſe; and for diſcovery of theſe articles, and to have up his note on a re-aſſignment of the houſe, the defendant brought his croſs bill; the plaintiffs, by their anſwer, admitted there were ſuch articles, but inſiſted, that the houſe lying in *Middleſex*, thoſe articles were never regiſtered in the *Middleſex* office, and there-

2 *Bac. Abr.* 598, 9. *S. C. totidem Verbis.*

fore void, as againſt the plaintiff; but on a hearing at the rolls, the maſter of the rolls decreed the original bill to ſtand diſmiſſed, with coſts; and on the croſs bill decreed the note given for the purchaſe-money to be delivered up on a re-aſſignment of the houſe; and the plaintiff in that cauſe likewiſe to have his coſts, by reaſon of the plaintiff's fraud in concealing the articles; and this decree was affirmed by my Lord Chancellor. *Mich.* 1727. *Beatniff* and *Smith.*

2 *Bac. Abr.* 599. S. C. *Vid.* 2 *Equ. Abr.* 684. *pl.* 7. A ſimilar point decreed; & 2 *Equ. Abr.* 63. *pl.* 7 A ſimilar point. *Vid. autem.* 2 *Equ. Abr.* 592. *pl.* 8.

* 12. So in a caſe between two purchaſers of lands in *Yorkſhire*, where the ſecond purchaſer having notice of the firſt purchaſe, but that it was not regiſtered, went on and purchaſed the ſame eſtate, and got his purchaſe regiſtered; yet it was decreed, that having notice of the firſt purchaſe, tho' it was not regiſtered, bound him, and that his getting his own purchaſe firſt regiſtered was a fraud, the deſign of thoſe acts being only to give parties notice, who might otherwiſe, without ſuch regiſtry, be in danger of being impoſed on by a prior purchaſe or mortgage, which they are in no danger of when they have notice thereof in any manner, tho' not by the regiſtry. *Blades* and *Blades*, by Lord Chancellor *King* decreed.

(C) *Where a purchaſer, who purchaſes from a perſon who has only a power to ſell, muſt ſee that the purchaſe-money is rightly applied.*

1. IF lands are appointed for payment of debts, the purchaſer, though there reſults a truſt to the heir, is not concerned whether the perſonal eſtate was ſufficient to pay the ſame, or whether too much was ſold, or the creditors paid; for he having paid the purchaſe-money ſhall hold again the heir and creditors, and their remedy muſt be againſt the truſtee or perſon impowered to ſell. 2 *Chan. Ca.* 115.

1 *Vern.* 301. S. P.

* 2. But if lands are deviſed to be ſold for payment of debts in a ſchedule, in that caſe the purchaſer is bound to ſee the purchaſe-money applied to the payment of thoſe debts; but if the truſt be general, to pay debts, tho' he has notice of them, yet the purchaſer is not obliged to ſee the money applied. *Mich.* 1692. *Abbot* and *Gibbs.*

3. If lands are veſted in truſtees by act of parliament, to be mortgaged for a particular purpoſe, it is incumbent on the mortgagee to ſee the money applied accordingly. *Trin.* 1686. *Cotterel* and *Hampſon*, 2 *Vern.* 5.

2 *Vern.* 444. S. C.

4. *A.* had an intereſt for a term for years in a Printing-Office, and made his will, and deviſed his term in the Printing-Office to his executors, in truſt, by profits, &c. to raiſe 2000*l.* for the portion of his daughter, and then for other truſts, and died; the executors mortgage this term for 1000*l.* to *J. S.* on pretence of want of aſſets to pay the teſtator's debts; and the plaintiff, the aſſignee of the mortgagee, brings his bill to foreclose the equity of the redemption; the daughter oppoſed it and inſiſted this mortgage ought not to take place till her portion was raiſed, for that the ſaid term was deviſed to the executors in truſt for that purpoſe, in the firſt place, and the mortgagee could not but have notice of it; and that there

there were no debts of the teſtator; or if any, the mortgagee at his peril ought to ſee the money applied to diſcharge them, and to be allowed no more than he could make out to be ſo applied. Lord Keep. Where a truſt is to ſell for payment of debts in a ſchedule, the purchaſer at his peril is to ſee the money applied to the payment of thoſe debts; but here the queſtion is, how far an executor's power does extend over a chattel which has a truſt annexed to it; the law has entruſted the executor with the perſonal eſtate to pay debts; and unleſs he has a general power, he has none at all; for if he cannot ſell, none can buy, and the general truſt muſt take place; and a purchaſer is not bound to prove the debts, or the number of them, or the application of the purchaſe-money; therefore the ſale is good; but after, on appeal to the houſe of lords, they altered this decree; and preferred the portion. *Quære Cauſam inde. Mich.* 1703. *Humble* and *Bill. It is now ſettled, and with great reaſon, that an executor, where there are debts, may ſell a term, and the deviſee of the term has no other remedy but againſt the executor to recover the value thereof, if there be ſufficient aſſets for the payment of debts.* Per *the Maſter of the Rolls, in the caſe of* Ewer *and* Corbet, Trin. 1723. 2 Will. Rep. 148.

CAP. XLVIII.

Remainder.

(A) *Of what Things a Remainder may be made.*

1. IF one hath the office of park-keeper, foreſter, gaoler, ſheriff, *&c.* to him and his heirs, he may grant theſe offices to one for life, remainder to another for life, *&c.* for *Omne majus continet in ſe minus*; and as they are grantable over in fee, ſo may they be granted in ſucceſſion to one for life, with remainders over, *&c.* So of lands, houſes, rents, commons, eſtovers, or any other intereſt or profit *in eſſe*, wherein the grantor hath the abſolute property to him and his heirs for ever. *Plow.* 479. *b.* 381. *a.* 2 *Co.* 48, 97.

2. But where a man ſeiſed of lands in fee granted thereout a rent-charge to one for life, or years, remainder over to another in fee, or in tail, *&c.* and it was doubted if this remainder were good, becauſe this rent had no exiſtence at all before the grant, and the grantor cannot be ſaid to have any part of the rent left in him, as he would have of land, becauſe he firſt gave being to the rent,

rent, and bounded the time of its exiſtence; which being run out, nothing thereof remains to grant over to another, and a remainder is to be granted out of that which would otherwiſe be a reverſion in the grantor; which here this rent cannot be, being newly created; but yet in this caſe, by the better opinion of the books, and a * judgment directly in point, ſuch remainder of a rent newly created have been held good; for as the grantor might at firſt have granted it in fee, or for ever, having ſuch perpetual and durable intereſt in the fund, out of which it was to ariſe; ſo he may ſhare and divide his grant, and give part thereof to one, and part to another, in ſucceſſion; and the rather, becauſe the particular eſtate and remainders are but one eſtate as to the grantor, divided in limitation only, being limited to paſs out of him all at the ſame time; and as to him make no difference, whether the one or more take benefit jointly, or in ſucceſſion one after another; but if he grant ſuch rent for life, or years, to one, without going farther, he cannot after grant the reverſion thereof to another, becauſe he has no reverſion in him, for the reaſon before given; and the reaſons of this caſe will go likewiſe to commons, eſtovers, *&c.* newly created. 2 *Roll. Abr.* 415. 2 *Co.* 70, 76, 78. 1 *Lev.* 144. 1 *Sid.* 285. 2 *Keb.* 29.

* 2 *Salk.* 577. 2 *Lutw.* 1225.

3. If one be created baron, viſcount, *&c.* by patent, and after, in the ſame patent, the ſame honour is granted to another in remainder; yet this operates as a new grant, and not as a remainder, for the king had no reverſion of that honour in him, though he had ſtill the ſame power of appointing one in ſucceſſion to take it, as he had of granting it to the firſt. *Show. P. C.* 5, 11. *Salk.* 466.

4. But what ſeems moſt proper to be enquired into under this head, is the reaſon and practice of limiting remainders in perſonal goods, or chattels, for they in their own nature ſeem incapable of ſuch a limitation, becauſe being things tranſitory, and by many accidents ſubject to be loſt, deſtroyed, or otherwiſe impaired; and alſo the exigences of trade and commerce requiring a frequent circulation thereof, it would put a ſtop to all trading, and occaſion perpetual ſuits and quarrels, if ſuch limitations were generally toleratedand allowed; but yet in laſt wills and teſtaments ſuch limitations over of perſonal goods or chattels have ſometimes prevailed, eſpecially where the firſt deviſee had only the uſe or occupation thereof deviſed to him; for then they held the property to continue in the executors of the teſtator, and that the firſt deviſee had no power to alter or take it from them; yet in either caſe, if the firſt deviſee did actually give, grant or ſell ſuch perſonal goods or chattels, the judges would very rarely allow of actions to be brought by thoſe in remainder, for recovery thereof; hence it came to paſs, that it was a long while ere the judges of the common law could be prevailed on to have any regard for a deviſe over, even of a chattel real, or a term for years after an eſtate for life limited thereon; becauſe the eſtate for life being in the eye of the law of greater regard and conſideration than an eſtate for years, they thought he, who had it deviſed to him for life, had therein included all that the deviſor had a power to diſpoſe of; and though they have now gained that point upon the ancient common law, by eſtabliſhing ſuch remainders, and have thereby brought that branch out of the chancery (where they frequently helped the remainder-man, by allowing of bills to compel

compel the first devisee to give security); yet it was at first introduced into the common law, under the new name of *Executory Devise*, and took all the sanction it has since received from thence, and not as a remainder, (for which *vide* title *devise*); but as to personal goods and chattels, the common law has provided no sufficient remedy for the devisee in remainder of them, either during the life of the first devisee, or after his death; therefore the chancery seems to have taken that branch to themselves in lieu of the other which they lost, and to allow of the same remedy for such devisee in remainder of personal goods and chattels, as they before did to the devisee in remainder of chattels real, or terms for years. *Dyer* 7. *Cro. Car.* 347. *Plow.* 521. *a. Godolph.* 356. *Swinb.* 137.

5. Therefore where a man devised 600*l.* a-piece to two daughters, and the residue of his personal estate to his son, and if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and one sister brought a bill against the executors and the other sister, to have her own 600*l.* and the half of the brother's personal estate, and had a decree accordingly, but was forced to give security to pay back her own 600*l.* in case she died during her minority; though it was said, if she died during minority, leaving issue, it would be a hard case. 1 *Chan. Ca.* 199.

6. A devise was made of the use of goods, plate and household-stuff, to one for eleven years, and after to another, and held a good devise; and a decree to deliver them accordingly after the eleven years. *Jolly* and *Wills*, 2 *Chan. Rep.* 137.

7. So upon a devise of certain books, jewels and rarities to one for life, and after of the things themselves to another; he in the remainder brought a bill in the life-time of the first devisee to have security for their forthcoming after the death of the first devisee; and the court being assisted by two judges held the remainder good, but ordered them to move for the security another time. *Vachell* and *Leman*, 2 *Chan. Rep.* 151.

* 8. A farmer devised his stock (which consisted of corn, hay, cattle, *&c.*) to his wife for life, and after her death to the plaintiff; it was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them; but the master of the rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale, and an account was decreed to be taken accordingly. *Mich.* 1702. *Hayle* and *Burrodale.*

9. The distinction which has been taken between the devise of a personal thing to one for life, remainder to another, and the use thereof to one for life, with a remainder over, seems now exploded in conformity to the civil law; and likewise as the testator's intention appears the same in both cases. 37 *H.* 6. 1 *Brok.* 54 (57) Title *Devise*, 13 *Co.* 5, 16. *Owen* 33. 2 *Vern.* 245.

10. Therefore if a man devises houshhold goods to his wife for life, and afterwards to his son; this is a good devise over, and the same as if the devise had been only of the use of the goods to the wife for life. *Mich.* 1696. *Hide* and *Parrot (a)*, 2 *Vern.* 331. decreed. *Gibbs* and *Barnardiston*, S. P. *Hil.* 1711. decreed.

(a) *Will. Rep.* 1. 6. S. C. where it is

[illegible], that Lord Keep. took time to consider of this point; and afterwards on the strength and authority of the precedents, which had followed the Civil and Canon Laws in construing the [illegible] of the thing, and not the thing itself to pass, where the first devise is for a limited time, [illegible] order the better to comply with the intention of the testator, allowed the devise over to be [illegible]. And the Reporter adds, and thus it is now settled; and refers to the cases *Tissen* and [illegible], and *Upwell* and *Halsey.*

11. But

11. But if money, goods, or other perſonal chattels, are deviſed to one and the heirs of his body, or to one, and if he dies without heirs of his body, the remainder; this remainder is totally void, and the courts of equity will not allow of a bill by the remainder-man to compel ſecurity, *&c.* or to have the money, *&c.* after the death of the firſt deviſee; but it ſhall go to his executors or adminiſtrators; for the firſt deviſe gives the abſolute property of a perſonal eſtate, as a like deviſe of a real eſtate before the ſtatute *de donis* gave a fee, upon which no limitation could be made further; and as the heirs are the repreſentatives to take a real eſtate, ſo are the executors to a perſonal eſtate; and this is not within the ſtatute *de donis*, but remains as at common law. 2 *Vent.* 349. 2 *Chan. Ca.* 94. 2 *Chan. Rep.* 66, 153. 1 *Chan. Rep.* 122, 260. 1 *Vern.* 329. 1 *Salk.* 156. 2 *Vern.* 600.

12. And yet where a deviſe was of money and goods to one for life, and if the deviſee died without iſſue, then to go over to another, this was held a good deviſe over; for the firſt limitation being expreſsly for life the words after could not inlarge it by implication, as they could a real eſtate, and then it falls within the common rule of other caſes, where the limitation is held good, the contingency being to happen within the compaſs of a life or lives *in eſſe*. 1 *Chan. Rep.* 411. But for this *vide* of executory deviſes of terms for years, title *Deviſes*.

13. So where *A.* deviſed in the words following, *viz. And the reſt and reſidue of my eſtate unbequeathed ſhall be put forth to intereſt by my executors, and the one half of the intereſt ſhall be paid to my ſiſter* A. C. *during her life, and the other half of the intereſt unto her daughter* A. S. *and ſhe to have one half of my houſhold goods, and after her mother's deceaſe to have all the intereſt during her life; and my will is, that if the ſaid* A. S. *die without iſſue of her body, the principal of the reſidue ſhall be divided equally between* M. *and* F. *and ſuch children as are or ſhall be born of their bodies then living*; and it was held that the remainder to M. and F. was good. *Paſch.* 1688. *Smith* and *Clever*, 2 *Vern.* 38, 59.

14. A term for 900 years was aſſigned to truſtees, in *truſt to permit the huſband and wife*, and *the ſurvivor of them, to receive the profits for ſo many years of the term as they*, or *the ſurvivor of them, ſhould happen to live*; and *after* their death to the uſe of the *heirs of the body of the wife, by the huſband to be begotten*, and it was held, that the *heir* of the body took by *purchaſe*, and that it did not veſt abſolutely in the mother, who ſurvived, ſo as to go to her adminiſtrator. *Mich.* 1690. *Peacock* and *Spooner*, 2 *Vern.* 43, 195. decreed, and affirmed in the houſe of lords.

2 *Freem.* 114. S. C. ſtates it thus: The truſt of a term for years upon a marriage, was limited to *A.* the huſband *for life*, then to *B.* the wife *for life*, and then to the *heirs of the body of the wife by the huſband to be begotten*. *A.* dies, *leaving iſſue*, *B.* married a ſecond huſband, *and dies*, the huſband takes adminiſtration; and the queſtion was whether the *huſband* ſhould have the term, as adminiſtrator to the wife, or the *iſſue*; and it was *reſolved by three lords commiſſioners*, that the *iſſue* ſhould have it; for to ſupport the intent of the ſettlement, they would take the words *heirs of the body* to be *deſcriptio perſonæ* and *not* words of *limitation*. Affirmed *in Dom' Proc'*. This reporter in a note ſays, That *ſeems to carry the truſt of a term farther than any other judgment, and contrary to the former reſolutions.*

15. But *afterwards* a decree at the rolls, grounded upon the caſe of *Peacock* and *Spooner*, was *reverſed*, and decreed the *limitation to the heir male void*; and that the *whole veſted in the father by the limitation to him for life*, remainder to the *heirs of the body*. *Hill.* 1710. *Webb* and *Webb*, 2 *Vern.* 668.

16. *A.* being poſſeſſed of an annuity of 14*l. per ann.* for nine nine years, out of the exchequer, on his marriage covenants

Gilb. Rep. 97. S. C. *in totidem verbis.*

B. and *C.* to pay this 14*l. per ann.* to his wife for her ſeparate uſe, and after the death of either of them, then to the ſurvivor for life; and after the death of both, then to the child or children to be begotten between them; and in default of ſuch child or children, then to his own executors and adminiſtrators for the reſidue of the term; *A.* and his wife had iſſue only one ſon *(a)* who lived to the age of five years, and then died; and after the death of *A.* and his wife, the plaintiff took out adminiſtration to the ſon, and brought his bill againſt the executors of *A.* and his wife for this annuity; and it was inſiſted upon, that the limitation to the executors and adminiſtrators of *A.* was void, being after a limitation to the child or children, which was the ſame as if it had been limited to the iſſue; and a ſettlement of a term on truſtees, in truſt to permit the father to receive the profits for ſo many years of the term as he ſhould live, and after to permit the mother to receive the profits for ſo many years of the term as ſhe ſhould live, and then in truſt to permit their child or children, or iſſue, to receive the profits for the reſidue of the term, will bear no limitation over in default of iſſue or children, in caſe there be any one in being, no more than ſuch a limitation of the term itſelf would be good; for this would be to introduce and revive all the inconveniencies of a perpetuity, which have been ſo long ſince exploded, and the truſt of a term muſt be limited in the ſame manner as the term itſelf will bear a limitation. But the Lord Chancellor ſaid, this being by way of covenant, no more paſſed out of him than to ſerve the uſes expreſſed; and it was not a diſpoſition of the annuity itſelf, but only a covenant to pay the 14*l. per Ann.* in ſuch manner; and ſince it was never deveſted out of *A.* he would not, on this bill, on any pretence of equity, tear it out of him or his executors; and ſo diſmiſſed the bill, though he did not at all diſpute the caſe, if it had been of a term, or the truſt of a term, ſettled in ſuch manner, that the remainder would not have been good; but here there was only a covenant to pay the 14*l.* and not the annuity itſelf, which was thought at the bar, to be an over-nice diſtinction *. *Trin.* 1715. *Baſſe* and *Grey.*

(a) Note; the ſon ſeems to have ſurvived *A.* and his wife.

* But this decree ſeems to be reaſonable, becauſe the adminiſtrator comes for a ſpecific performance of the covenant, and that he cannot do, who was not originally in contemplation, or intended to be provided for by the covenant; but if that the term had actually been veſted to theſe uſes, then the inteſt of the term being veſted in the child and the heirs of his body, as it muſt be if the ſettlement had been drawn according to the covenant, then it muſt have gone to his adminiſtrator. *Gilb. Eq. Rep.* 98. in S. C.

CAP. XLIX.

Rent.

(A) *In what Caſes there may be Remedy for Rent in Equity, when none at Law.*

(B) *In what Caſes the Leſſee may be relieved againſt the Payment of Rent in Equity.*

(A) *In what Caſes there may be Remedy for Rent in Equity, when none at Law.*

1. IF a rent be deviſed by will in writing, a court of equity may compel the tenant of the land to give ſeiſin, becauſe by intendment the tenant of the land was *inops conſilii* at the time of the deviſe. *Moor* 805, *Lat.* 147

2. So if a man grants a rent-ſeck, equity will decree ſeiſin to be given, and the rent to be paid to the grantee. 1 *Rol. Abr.* 378. 1 *Chan. Ca.* 147.

3. A bill was exhibited for the payment of 3*l.* for a rent of 5*l. per Ann.* arrear, for twelve years, ſuggeſting that the deed by which it was created was loſt; and there being proof that it was conſtantly paid before the twelve laſt years, the maſter of the rolls decreed that the arrears and growing rent ſhould be paid because it did not appear what kind of rent it was, and ſo no remedy at law. *Hil.* 20 & 21 *Car.* 2. *Collet* and *Jaques*, 1 *Chan. Ca.* 12

4. So where a bill was brought, ſuggeſting, that the plaintiff did not know the nature of the rent, nor the boundaries of the land, ſo as to be able to declare with exactneſs; and the court ſaid, that it ought to be decreed; but at the importunity of the defendant directed a trial, whether there was any ſuch grant, or not. 1 *Vern.* 359.

5. A rent of 1*l.* 14*s.* was granted by King *H.* 6. to *Eaton* College, iſſuing out of certain lands; the bill ſuggeſted, that the College did not know where the lands lay, ſo as to enable them to diſtrain, and therefore pray that the executor of the tertenant may be anſwerable for the arrears; which the maſter of the rolls thought reaſonable, in reſpect that the perſonal eſtate was increaſed thereby; and decreed it accordingly. 1 *Chan. Ca.* 12

6.

6. So where the plaintiff by his bill ſuggeſted, that he having the grant of a rent-charge iſſuing out of certain lands, the defendant, to hinder him from a diſtreſs, converted the premiſſes into tillage; and my Lord Chancellor directed to have it tried, whether there was any fraud uſed to prevent the plaintiff from diſtraining, and declared, that if there was, he would grant relief. 1 *Chan. Ca.* 144.

7. *A.* ſeiſed of an eſtate, deviſed it to *B.* and thereout deviſed 100 *l. per ann.* to his father, payable half-yearly, and in default of payment, to enter and diſtrain, and the diſtreſs to detain until the arrears paid; the father dying, his widow and executrix brought her bill for ſatisfaction of her arrears; and the Maſter of the Rolls decreed the arrears with coſts and charges, and ſhe to enter and enjoy until ſatisfied. *Mich.* 1700. *Foſter* and *Foſter*, 2 *Vern.* 386. but *vide* 2 *Vern.* 382. where on a like bill my Lord Keeper refuſed to relieve the plaintiff; the party having provided a remedy by diſtreſs, muſt be ſatisfied with it, unleſs ſome particular fraud is proved, as letting the land lie freſh, or depaſturing it in the night-time, to prevent a diſtreſs; and 1 *Chan. Ca.* 185. that equity will not grant a remedy for rent, *(a)* when there is one at law, nor change the nature of the rent, ſo as to make the perſon liable, unleſs there was fraud, *&c.* in preventing a diſtreſs. *Prec. in Chan.* 122. S. C.

(a) Under what circumſtances Equity will grant relief, where a bill is brought for Rent. 1 *Atk.* 598.

(B) *In what Caſes the Leſſee may be relieved againſt the Payment of Rent in Equity.*

1. THE plaintiff was tenant to the Lady *M.* of a houſe in *London* at a certain rent; he left the houſe and went to *Oxon* to King *Charles* I. and then ſent his ſervant with the key of the houſe to the lady, and deſired her to re-enter and accept the ſurrender; ſhe ſaid ſhe would adviſe with the defendant, her ſon in law, (who then ſat in the houſe of commons, and was on the ſide of the parliament); afterwards ſhe refuſed to accept of a ſurrender; the houſe was made an hoſpital by the parliament for maimed ſoldiers; the defendant, as executor to the lady, brought debt at law againſt the plaintiff for rent incurred whilſt the houſe was ſo uſed; and on a bill to be relieved againſt the action, my Lord Chancellor took time to adviſe; but declared, that if he could, he would relieve the plaintiff. *Paſch.* 19 *Car.* 2. *Harriſon* and *Lord North*, 1 *Chan. Ca* 83.

2. A leſſee for years under a certain rent, and covenants to repair, makes 100 under-leaſes; the premiſſes not being repaired, nor the rent paid, a re-entry is made and the original leaſe avoided, *ſix* of the under-leſſees having brought a bill againſt the head landlord and firſt leſſee *& al'*; the court held, that there could be no decree to apportion the head landlord's rents, nor any relief for the plaintiffs, but on their payment of the whole rent in arrear, and repairing all the premiſſes; but having ſo done, they might compel the reſt of the under-tenants to contribute. 2 *Vern.* 103.

CAP.

CAP. L.

Tithes.

(A) *Tithes, of what Things due, and by whom to be paid.*
(B) *Of a* Modus.

(A) *Tithes, of what Things due, and by whom to be paid.*

1. THough beaſts of the plough are exempt from paying tithes, becauſe by the labour of ſuch cattle tithes of another kind ariſe; yet if oxen are turned to graſs, and fatted for ſale, they ſhall from ſuch time pay tithe for the herbage they eat, being no way beneficial to the parſon in any other tithes. *Edmond* and *Sandys*, *Show. P. C.* 162.

2. A bill was exhibited to be relieved for tithe oar in *B.* a townſhip within the rectory of *C.* and the court held, that tithe oar was not due of common right, but by particular cuſtom only; and therefore directed a trial to be had at law, whether there was any, and what cuſtom, within the ſaid townſhip for the payment of tithe oar, with direction to the judge to indorſe the *Poſtea*, how the cuſtom was found upon the trial. *Paſch.* 1685. *Niccol* and *Wiſeman*, 2 *Vern.* 46.

* 3. It was decreed in the houſe of peers, on appeal from the court of Exchequer, that the tithes of a mill are perſonal tithes againſt ſeveral ſeeming authorities or doubts in the books; and that in conſequence of their being perſonal tithes, not the tenth toll or tenth diſh of the corn-ground belongs to the parſon, but the tenth part of the clear profits, after the charges of erecting the mill, and the other charges of ſervants, horſes and other expences deducted. *Newt* and *Chamberlain*, 1706.

4. If a man hath a nurſery of trees, and he ſells them, and puts them up himſelf, he ſhall pay the tithe; but if he ſells them particularly to another, the vendee ſhall pay the tithes, as in caſe of tithe of corn, if ſold ſtanding, the vendee ſhall pay the tithes;

f ſold after ſeverance, the vendor muſt. *Mich.* 16 *Car.* 2. *Grant* nd *Hedding*, *Hard.* 380, 381.

5. Tithes for the agiſtment of cattle are payable by the owner of the cattle, for the cattle take the profits and herbage of the ſoil; ſo in caſe of commoners. *Hard.* 184. *per curiam*; and the Chief Baron ſaid, the owner of the ſoil might pay them; but clearly, the agiſtor is compellable to pay them.

(B) *Of a* Modus.

1. A Bill was exhibited to examine witneſſes *in perpetuam rei memoriam*, to prove a *modus decimandi*; the defendant demurred, for that the bill was to eſtabliſh a cuſtom againſt the church and in prejudice of tithes that are due *communi jure*; and ſeveral precedents were cited, where bills to have a *modus* (a) decreed, were, upon demurrer, diſmiſſed; but this bill being only to preſerve teſtimony, the Lord Keeper thought it reaſonable the defendant ſhould anſwer, and over-ruled the demurrer. *Trin.* 1683. *Somerſet* and *Fotherby*, 1 *Vern.* 185.

(a) It was formerly doubted, whether a Bill in Equity would lie to eſtabliſh a *Modus*, or cuſtomary manner of paying tithes, eſpecially if the cuſtom had not been found good at law; and ſometimes on a demurrer to ſuch bills they have been diſmiſſed; but the conſtant practice now is, to retain ſuch bills, and to decree on the pleadings, or to direct a particular point to be tried at law, concerning the reality of ſuch a cuſtom, or the legality of it. 1 *Chan. Rep.* 27. 1 *Chan. Ca.* 187.

* 2. A bill was brought to eſtabliſh a *modus*, or cuſtomary manner of payment of tithes, which was thus, that every perſon not inhabiting or reſiding within the pariſh, having lands, meadow or paſture grounds, have uſed to pay for every acre, time out of mind, on *Good Friday*, 4 *d. per* acre, and ſo in proportion for a greater or leſſer quantity than an acre, to the parſon, in lieu of tithes of thoſe lands; but when the owner lived or inhabited within the pariſh, then to pay tithes in kind of thoſe lands; and the only queſtion was, whether this was a good *modus*, or not.

It was inſiſted upon for the parſon, that it was not a good *modus*, for the uncertainty of it; and for that was cited and relied on a caſe in 1 *Lev.* 116. and the ſame caſe 1 *Keb.* 602. where it is called a leaping or a dancing *modus*, and there held not to be good for that reaſon, for he may live in the pariſh to-day, and remove out of it to-morrow; and how can the rector, in a caſe of ſuch uncertainty, know how to make his demands, when it is in the power of the pariſhioner to defraud him thereof, by going out, or coming into the pariſh at his pleaſure; and it is the property of a *modus*, that the parſon may as well know how to demand it, as the tenant to pay it; but here it is wholly in the power of the tenant to make it either a *modus*, or payable in kind, juſt as he pleaſes; and if two ſhould agree thus; you ſhall live in my houſe within the pariſh, and I in yours out of the pariſh, this will alter the tithes for the time; or if there ſhould be two joint tenants, and one ſhould live in the pariſh, and the other out of the pariſh, what is to be done in this caſe?

That tithes are of the revenue of the church, and any thing done in derogation thereof is to be taken ſtrictly.

That

That this *modus* is to ariſe by the act of the party, and no *modus* can ariſe by the act of the party, but what is for the benefit of the parſon; but here it is to ariſe by the act of the party, and yet is to the prejudice of the parſon; for the difference between tithes in kind and this *modus* are 10 *d. per ann.* 1 *Roll. Abr.* 649.

This *modus* tends to depopulate the pariſh, ſo as there may be none to preach to; and all cuſtoms founded in fraud, are to be diſallowed, as 1 *Leon.* 99. *Cro. Eliz.* 446.

But on the other ſide it was argued, that this was a good *modus*, that as on the one hand the parſon is not to be defrauded of his dues, ſo on the other hand a *modus* is not to be overturn'd on ſlight grounds; that if they ſhould, purchaſers might be affected, who came in under a perſuaſion, that ſuch *modus's* are all they are to pay; that it is not neceſſary to ſhew upon what particular reaſon every *modus* began, if it may be ſuppoſed to have a reaſonable beginning; that this might begin when there were more lands in the pariſh than the inhabitants could manure, and yet the owners of thoſe lands who lived elſewhere ſhould be obliged to pay 4 *d.* an acre for them, though it is not neceſſary to ſhew the reaſons on which they began.

That all *modus's* may be ſaid to be an invention to cheat the parſon; and ſo in ſome books they are called, as they are leſs than tithes in kind.

That as to its being a leaping or dancing *modus*; ſo was that of the *Ciſtertians* and other religious orders, who paid tithes of lands *quamdiu in propriis manibus excoluntur*; ſo tithes are payable of hay whilſt it continues meadow; but if broken up, the tithes thereof ceaſe till laid down again; and by *Godb.* 194. it appears there to be in the power of the occupier to chuſe, whether to pay his tithes to the parſon or vicar, and yet held good.

That this is not ſuch a new caſe as the other ſide would have it imagined; for *Cro. Eliz.* 136. is a caſe to this purpoſe, tho' perhaps it might not occur at the time the caſe in 1 *Lev.* and 1 *Keb.* came in queſtion; and that it is not ſo eaſy a matter to remove out of a pariſh at pleaſure; nor is it to be ſuppoſed any one would do it meerly to cheat the parſon; and it was ſaid in general, that this *modus* was as certain and permanent as moſt *modus's* or even as tithes in kind, which depend on the choice of the owner, whether he will plough his land for corn, or mow it for hay; and here it is ſo far certain, that the parſon is every year ſecure of having either tithes in kind, or 4 *d. per* acre; and if there is any fraud proved, the parſon will, notwithſtanding recover tithes in kind; as 1 *Leon.* 99. and the caſe afore cited 1 *Lev.* and 1 *Keb.* was exploded, and denied to be law; and the following caſes in the exchequer were quoted as authorities to point. *Aſhly* and *Pattiſon*, *Trin.* 12 *Car.* 1. *Aſhford* and *Newcomen*, *Trin.* 12 *Car.* 2. *Plaxton* and *Langſton*, *Mich.* 2 *W.* & *M. Reynolds* and *Appland* about two years ago, and alſo *Moor* 90. *Hob. Cowper* and *Andrews*, and 2 *Brown Ent.* 595, 6.

The court held it a good *modus*, and ſaid, that all *Modus's* were at firſt upon an agreement between the parſon, patron and ordinary by ſome deed or inſtrument in writing, in the nature of a contract or agreement; which, tho' now loſt, yet being run out into a preſcription continues good; that here is no uncertainty in the *modus* for the parſon is always ſure to have the 4 *d. per* acre, or elſe the

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tithes in kind; nor is there any burden on the reſt of the pariſhioners, by one or two going out of the pariſh; and a leaping or dancing *modus* is where the *modus* itſelf varies, and is ſometimes more and ſometimes leſs, which is not the preſent caſe; and decreed accordingly by the lord Chancellor, aſſiſted by Mr. juſtice *Reynolds* and juſtice *Forteſcue*; my lord Chancellor ſaid, the caſe in *Keble* might perhaps be the occaſion of this ſuit. *Trin.* 1730. *Chapman* verſus *Biſhop of Lincoln.*

CAP. LI.

Trade and Merchandize.

(A) *Of Principals and Factors.*
(B) *Of Partners in Trade.*
(C) *Of Policies of Inſurance, and Bottomry-Bonds.*
(D) *Of Part-Owners, Maſters, and Freighters of Ships.*
(E) *Of Cuſtoms amongſt Merchants relating to Accounts, and Notes given by them for Money.*

(A) *Of Principals and Factors.*

1. IF a factor ſave the cuſtoms of goods due to a foreign prince, and ſuch ſaving, by the laws of that country, is felony in the factor, and a forfeiture of all the freight, the factor ſhall have the benefit of the cuſtoms ſaved, and not the employer, for he runs the hazard wholly, and has the poſſeſſion, which is a right againſt all, except him that hath the very right. *Trin.* 15 *Car.* 2. *Smith* and *Oxenden*, 1 *Chan. Ca.* 25. Two merchants having certified, that the benefit of the non-payment of the cuſtoms belonged to the factor; and two others, that it belonged to the employer. 1 *Chan. Ca.* 76. S. P.

Nelſ. Chan. Rep. 87. *Borre* and *Vande* S. C. and P. cas. 1 and 2. and why not deemed a fraud to cheat foreign

2. But if the duties or cuſtoms are due to our king, and the factor ſaves them, and a bill is brought by the merchant againſt him, he ſhall be obliged to diſcover them; for this cuſtom being founded in fraud, is void. *Mich.* 15 *Car.* 2. *Borre* and *Vandal*, 1 *Chan. Ca.* 30.

ſtates of their cuſtoms? Fraud is always the ſame, tho' an allowance of it in one caſe more prejudicial than in another: and ſurely the court of Chancery ſhould not connive at any thing ſo detrimental to good faith, commerce, and reciprocal aſſurance, as even ſmuggling into foreign ports; it is not proceeding on the great maxim "*quod tibi non vis alteri ne feceris*" to make any diſtinction in this caſe in our favour.

3. If *A.* employs *B.* as his factor to ſell cloth, and *B.* ſells the cloth on credit, and before the money is paid, *B.* dies indebted by ſpecialty more than his aſſets will pay; this money ſhall be paid to *A.* and not to the adminiſtrator of *B.* as part of his aſſets, but thereout muſt be deducted what was due to *B.* for commiſſion; for a factor is in nature only of a truſtee for his principal. *Hill.* 1708. *Burdet* and *Willet*, 2 *Vern.* 638.

Mem. I have read (I think in *Hawkins* P. C.) that it has been holden by many, that an action or indictment (probably the latter) will lie againſt a ſubject who defrauds a foreign prince

4. The plaintiff being a factor in *Blackwell-Hall*, advanced money for his principal, relying, as was ſurmiſed, on the credit of cloths reſting in his hands, to re-imburſe himſelf; the clothier died, his adminiſtrator ſued at law for the cloth; and the factor prayed, that he might be allowed, on account, the monies he advanced, but was diſmiſſed; for if there are debts of a higher nature, it would be a *devaſtavit* in the adminiſtrator, to pay or diſcount the plaintiff's debt. *Mich.* 1689. *Chapman* and *Derby*, 2 *Vern.* 117. *Vide* 1 *Vern.* 428.

of his cuſtoms, as it may be a means of ſowing diſſentions between our king and that ſtate and chiefly of hurting our trade in that country. Quær?

(B) *Of Partners in Trade.*

1. IF two perſons ingage in a joint undertaking in the way of trade, or enter into copartnerſhip, it is not neceſſary to provide againſt ſurvivorſhip. 1 *Vern.* 217.

2. The plaintiff's huſband (to whom ſhe is adminiſtratrix) and the defendant were copartners for many years in the trade of a druggiſt; the plaintiff brought her bill for a diſcovery of the eſtate, and her proportion and dividend thereof, *&c.* the defendant anſwered; and it appearing that many debts owing to the joint trade ſtood out, it was moved, on behalf of the plaintiff, that an able attorney might be appointed to ſue for and recover thoſe debts, it being alledged in the bill, that the defendant carrying on a diſtinct trade for himſelf with the perſons that were debtors to the joint trade, to oblige them, had forbore to call in their debts; and it was ordered accordingly unleſs the defendant, within a week, would give ſecurity to the plaintiff to anſwer her moiety of the debts that were ſtanding out. *Hil.* 1682. *Eſtwick* and *Conningſby*, 1 *Vern.* 118.

3. *A.* and *B.* were partners, as woollen-drapers, *A.* received money in the ſhop of *J. S.* and gave a note for it, ſigned by himſelf and partner; *A.* and *B.* being both dead, and *A.* not leaving ſufficient aſſets, it was held on a bill brought by *J. S.* againſt the executors of both the partners, that this note being given by one of the partners it ſhould bind both; and that tho' at law it binds only the executor of the ſurviving partner, yet in equity the creditor may follow the eſtate of the other, though no proof was made that this money was brought into the ſtock

or uſed in trade. *Trin.* 1693. *Lane* and *Williams*, 2 *Vern.* 277, 292.

4. *A. B.* and *C.* were partners together in the trade of a *Dry Salter*, *C.* imbezils and waſtes the joint-ſtock, contracts private debts, and becomes a bankrupt; the commiſſioners aſſign the goods in partnerſhip; *A.* and *B.* brought a bill for an account, and to have the goods ſold to the beſt advantage; and inſiſted, that out of the produce of the goods the debts owing to the joint trade ought to be paid in the firſt place, and that out of *C.*'s ſhare ſatisfaction ought to be made for what *C.* had waſted or imbeziled, and that the aſſignees could be in no better caſe than the bankrupt himſelf, and were intitled only to what his third part would amount unto clear, after debts paid, and deductions for his imbezilments; and the court ſeemed to be of that opinion, but ſent it to a maſter to take the account and ſtate the caſe. *Trin.* 1693. *Richardſon* and *Goodwin*, (*a*) 293. *vide* title *Bankrupt*, *P.* 55. *Ca.* 5. (*a*) 2 *Vern.* 293.

(C) *Of Policies of Inſurance and Bottomry-Bonds.*

Vid. for this head, 3 *Bac. Abr.* 601. and *Vid Brit. Stat.* 19 *Geo.* 2. *cap.* 37.

1. WHERE a policy of inſurance is againſt reſtraint of princes, that extends not where the inſured ſhall navigate againſt the law of countries, or where there ſhall be a ſeizure for not paying cuſtom or the like. 2 *Vern.* 176. *per Hutchins* lord Commiſſioner.

2. The defendant had lent 300*l.* on a bottomry-bond, and afterwards inſured 450*l.* on that ſhip with the plaintiff, for ſix *guineas per cent.* premium, as intereſted for money lent, *&c.* the ſhip outlived the time at which the money was payable, and afterwards was loſt in the *Eaſt-Indies*; the defendant recovered the money on the bottomry-bond, and afterwards ſued the inſurers upon their policy, who brought their bill to be relieved, for that the money inſured by the policy, was the money lent upon the bottomry, and that the defendant was no otherwiſe intereſted in the ſhip; and that the money being paid, no uſe ought to be made of the policy; and the court decreed the policy to be delivered up. *Trin.* 1692. *Goddart* and *Garret*. 2 *Vern.* 269. S. C. where it is held, that a perſon having no intereſt but his bottomry-bond cannot inſure: and that a perſon who has no intereſt in the ſhip or cargo cannot inſure; tho' the policy was intereſted, or not; but inſurances are for the benefit of traders and merchants only; not that others unconcerned ſhould make unreaſonable gain. But Q.

3. But where the defendant lent the plaintiff 250*l.* on a bottomry-bond, and afterwards inſured on the ſame ſhip, but the inſurance was larger as to the voyage, there being liberty to go to other ports and places than what were contained in the condition of the bottomry-bond; the ſhip being loſt, the defendant recovered the money on the policy of inſurance, and alſo put the bottomry-bond in ſuit; the ſhip, though loſt, having deviated from the voyage mentioned in the bond; the plaintiff brought his bill pretending the defendant ought not to have a double ſatisfaction, to recover both on the inſurance and alſo on the bond, he having inſured only in reſpect of the money he had lent on the bottomry, and had no other intereſt in the ſhip or cargo, and therefore the plaintiff would have had the benefit of the inſurance, paying the premium; but the court held, that the defendant having paid the premium, was intitled to the benefit of the policy, and run the riſque, whether the ſhip was loſt, or not; and the inſurers might as well pretend to have aid of the bottomry-bond, and to diſcount the money recovered thereon, as the plaintiff to have the

money recovered on the policy to eaſe the bottomry-bond. *Mich.* 1716. *Harman* and *Vanhatton*, 2 *Vern.* 717.

4. On a policy of inſurance on goods by agreement valued at 600*l.* and the inſured not to be obliged to prove any intereſt; the lord Chancellor ordered the defendant to diſcover what goods he put on board; for although the defendant offered to renounce all intereſt to the inſurers, yet he referred it to a maſter, to examine the value of the goods ſaved, and to deduct it out of the value or ſum of 600*l.* at which the goods were valued by the agreement. *Mich.* 1716. *Le Pypre* and *Farr*, 2 *Vern.* 716.

5. The plaintiff entered into a penal bond of bottomry, to pay 40*l. per* month, for 50*l.* the ſhip was to go from *Holland* to the *Spaniſh* iſlands, and ſo to return for *England*; but if ſhe periſhed, the defendant was to loſe his 50*l.* ſhe went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africk*, and upon that occaſion went to *Barbadoes*, and then periſhed at ſea; the plaintiff being ſued on the bond and penalty ſought relief, pretending that the deviation was on neceſſity; but his bill was diſmiſſed, ſaving as to the penalty. 2 *Chan. Ca.* 130. *vide* 2 *Salk.* 444.

3 *Bac. Abr.* 601. S C. 6. But where *J. S.* entered into a bottomry-bond, whereby he bound himſelf, in conſideration of 400*l.* as well to perform the voyage within ſix months, as at the ſix months end to pay the 400*l.* and 40*l.* premium, in caſe the veſſel arrived ſafe, and was not loſt in the voyage; and it fell out that *J. S.* never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved; and in regard the ſhip lay all along in the port of *London*, and ſo the defendant run no hazard of loſing his principal, the lord Keeper thought fit to decree, that the defendant ſhould loſe the premium of 40*l.* and be contented with his ordinary intereſt. *Mich.* 1684. *Deguilder* and *Depeiſter*, 1 *Vern.* 263.

3 *Bac. Abr.* 602. * 7. A part-owner of a ſhip borrowed money of the plaintiff upon a bottomry-bond, payable on the return of the ſhip from the voyage ſhe was then going in the ſervice of the *Eaſt-India* Company, and the *Eaſt-India* Company broke up the ſhip in the *Indies*; and the owners brought their action againſt the Company, and recovered damages, but they did not amount to a full ſatisfaction; and the obligee brought his bill to have his proportionable ſatisfaction out of the money recovered, but his bill was diſmiſſed, and he left to recover as well as he could at law; for a court of equity will never aſſiſt a bottomry-bond which carries an unreaſonable intereſt. *Mich.* 1701. *Dandy* and *Turner*.

(D) *Of Part-Owners, Maſters and Freighters of Ships.*

1. IF there are three part-owners of a ſhip, and one of them refuſes to fit out the ſhip, and the others do it without his conſent, and this ſhip is loſt in the voyage; yet he who refuſed to join ſhall bear his proportion of the loſs, for he would have been intitled to a ſhare of the profits, if there had been any; but in caſe the other two part-owners had applied to the court of *Admiralty* (as regularly they ought to have done) that court would have made an order, that upon one part-owner's refuſing

refuſing to navigate the ſhip, the other two ſhould have liberty to do it alone, and ſhould not have been accountable to the part-owner that refuſed to join for any part of the profits; and then, in caſe the ſhip had been loſt, the whole loſs muſt have reſted on thoſe two who ſet out the ſhip. *Hill.* 1684. *Strelly* and *Winſon*, 1 *Vern.* 297.

2. Where the major part of the part-owners of a ſhip ſettle and agree an account of the profits of a voyage, it ſhall conclude the reſt. *Trin.* 1687. *Robinſon* and *Thompſon*, 1 *Vern.* 465. *per Curiam.*

3. A maſter of a ſhip, without the owner, treated with the plaintiff, a merchant, for the freight of the ſhip at eighty tuns, and accordingly entered into a charter-party with him, to ſail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the voyage, and there to unlade at a certain rate *per* tun; and for performance the maſter binds the ſhip, tackle, &c. valued at 300*l.* the maſter deviates and commits barratry, by which the merchant in effect, loſeth his voyage and goods; the merchant had a ſentence againſt the maſter and ſhip in *Barcelona*, which was confirmed in a higher court in *Spain*; and the owner having brought trover for the ſhip, the merchant exhibited his bill to be relieved againſt this action, and likewiſe another action brought for freight; and it was held by my lord Chancellor, that the charter-party having valued the ſhip at a certain rate, the owner is not liable further; and the maſter is liable for deviation and barratry; for ſhould it be otherwiſe, maſters would be owners of all men's ſhips and eſtates. 2 *Chan. Ca.* 238.

4. But where *A.* a maſter of a ſhip, of which the defendants were part-owners, bought ſeveral goods of the plaintiffs, as beef, biſket, ſails, cordage; the maſter failed, and a bill was exhibited to compel the defendants, the part-owners, to pay; who inſiſted, that *A.* only was liable; and beſides, that he had money from the owners to pay the plaintiff; and the court held, that *A.* was but a ſervant to the owners, and where a ſervant buys, the maſter is liable; and if the owners paid their ſervant, yet if he paid not the creditors, they muſt ſtand liable, and therefore decreed the owners to pay the plaintiffs their debts in proportion to their reſpective ſhares and intereſts in the ſhip. *Hil.* 1709. *Speering* and *Degrave*, 2 *Vern.* 643.

5. The plaintiff, a merchant in *London*, hired the defendant's ſhip to freight for a voyage to *Bourdeaux*, at 3*l.* 10*s.* *per* tun; it happened that an imbargo was laid on all merchant ſhips for ſix weeks; the ſhip afterwards proceeds on her voyage to *Bourdeaux*, and the defendant not diſcovering what agreement he had made with the plaintiff in *England*, the plaintiff's factors and correſpondents there agree to allow the defendant 6*l.* 10*s.* *per* tun, upon which latter agreement the defendant recovered at law; a bill being exhibited for relief againſt this ſecond and underhand agreement, obtained, as was alledged, by fraud, was diſmiſſed; for the defendant was at liberty to make a new agreement, by reaſon that the performance of the firſt was obſtructed by the imbargo after laid on all merchant ſhips. *Mich.* 1691. *Draddy* and *Deacon*, 2 *Vern.* 242.

6. *A.* and *B.* part-owners of the ſhip *Falcon*, and *C.* the maſter, by charter-party agree with the *Eaſt-India* Company, that the ſhip ſhould be ready to ſail the 10th of *March* 1683, and ſhould go from port to port, and to any port or place within the limits of the *Eaſt-India* Company's charter, as they ſhould direct, but was to be diſpatched back for *England*, on or before the 24th of *Jan.* 1684, or ſo ſoon after as to ſave her *Monſoon* for *England* that year, or in default of her being diſpatched within the time aforeſaid, the owners were to pay four months demurrage, at 7*l.* 10*s.* *per diem* for her *Monſoon* ſo loſt, and her ſtay in *India* after the 20th of *Jan.* 1684, with this further clauſe, that the Company might detain the ſhip in their imployment in trade or warfare for any longer time, not exceeding twelve months after the 20th of *Jan.* 1684, after the rate of 7*l.* 10*s.* and 6*d.* *per diem* demurrage, until the ſhip be diſpatched from the laſt lading port, or expiration of the twelve months, which ſhall firſt happen; but after the twelve months expired, the ſhip to return to *England*, and the Company not to be liable for any further demurrage, or any damage that may accrue by her detention after that time; and the Company covenant, on the ſhip's arrival in *England*, to pay freight for 300 tun, and demurrage from the 20th of *Jan.* 1684, until the ſhip ſhould be diſpatched, for the ſpace of twelve months after the ſaid 20th of *Jan.* 1684. And it was thereby provided, that until ſix days after the ſhip ſhall have returned to the port of *London*, and made a right and full diſcharge of all her lading, the Company are not to pay, nor to be liable to pay any of the ſums of money agreed on for freight or demurrage, or for detaining the ſhip in *India*; it being the intent of the parties, that if the ſhip ſhould be loſt either in her outward or homeward bound voyage, nothing ſhould be paid by the Company for freight or demurrage; the ſhip ſet ſail according to the charter-party, arrived in *India*, and was employed by the Company in trading from port to port for one year and upwards; and arrived in *India*, *Nov.* 23, 1684, and was to enter into demurrage in four months afterwards, which was the 23d of *March* 1684, and the twelve months after (during which time the Company by their charter-party might detain her) ended *March* 23, 1685, but the ſhip was employed in the Company's ſervice, ſo that ſhe arrived not at *Surat* until 1686, and from thence was ordered to *Bombay*, where the ſhip having been ſo long detained in thoſe ſeas was ſurveyed, and found not ſufficient for a voyage to *England*; and on *Sept.* 24, 1686, the ſeamen were diſcharged, and the ſhip left there, the Company refuſing to pay any thing for freight or demurrage, becauſe by the expreſs proviſion of the charter-party, they were not to pay until ſix days after the ſhip's arrival in *England*, and diſcharged of her lading; and if they were to pay any thing, yet they were to be charged with demurrage until *March* 23, 1685, only, as is provided by the charter-party, and refuſed likewiſe to account for the value of the ſhip, or ſhew how that they had diſpoſed of her. The part-owners brought a bill for relief; and the court held, that tho' the charter-party was ſo penned, that nothing could be recovered at law, yet the plaintiffs having a juſt demand ought to be relieved in equity; and therefore decreed, that the Company ſhould account for what they made of the ſhip, that they

Qu. if not "freighters".

they ſhould pay demurrage according to the rate mentioned in the charter-party, and that they ſhould alſo be charged in reſpect to freight. *Hil.* 1690. *Edwin & al'* and *the Eaſt-India Company*, 2 *Vern.* 210.

* 7. So in a caſe, where by the agreement there was no freight to be paid for the outward bound cargo, but only a certain rate *per* tun for the homeward-bound cargo; and when the ſhip arrived beyond ſea, the factor had no goods at all to load the ſhip with; and the court decreed payment of the freight. *Weſtland* and *Robinſon.* 2 *Vern.* 212. S. C. cited *per Cur.*

8. So where the *Eaſt-India* company took bonds from the mariners and officers of a ſhip, not to demand their wages, unleſs the ſhip returned to the port of *London*; and the ſhip arrived at a delivering port, and was afterwards taken by the *French*; and it was held by my lord chief juſt. *Holt.* in an action tried by him, and likewiſe in chancery, that the ſeamen and officers ſhould have their wages to the time of the arrival of the ſhip at the delivering port. 2 *Vern.* 727. *Edwards & ux. Verſ. Child, &c.* and the *Eaſt-India Company.*

(E) *Of Cuſtoms amongſt Merchants relating to Accounts and Notes given by them for Money.*

1. IF one merchant ſends another an account ſtated, and he deſires him to write to him ſpeedily, and ſend his exceptions, and the account is reſted upon fourteen years, it ſhall not afterwards be unravelled. 1 *Chan. Ca.* 127. *per Curiam.*

2. So where the plaintiff's late huſband and the defendant had dealings together as merchants, and ſhe exhibited a bill for an account; although it was agreed that the length of time was no bar, yet the plaintiff's huſband living many years after the trade and dealings between them ceaſed, and after ſome differences and diſputes had ariſen between them, and acquieſcing to the time of his death, the court diſmiſſed the bill, and left the plaintiff to recover at law, if ſhe could. *Mich.* 1692. *Sherman* and *Sherman*, 2 *Vern.* 276. and *per Hutchins* lord commiſſioner, amongſt merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object againſt it in a ſecond or third poſt.

3. One *Agris*, a goldſmith, having 150*l.* of *Berkley*'s money in his hands, gives him a note, whereby he promiſes to pay to him, or order, on demand, the ſum of 150*l.* *Berkley* being indebted in the ſame ſum to the plaintiff, delivers over that note to the plaintiff, but without making any indorſement; plaintiff preſently carries this note, and likewiſe another bill for 80*l.* which he had upon one *Jackſon*, to Sir *Stephen Evans* and *Hales*, goldſmiths in *Lombard-ſtreet*, who were his bankers or caſhiers, and they gave him a note to this effect, *viz. received of Mr.* Trowell (*the plaintiff*) 230*l.* *upon account*; and on the margin it was written thus, *Berkley* 150*l.* *Jackſon* 80*l.* and this note was ſigned by Sir *Stephen* and *Hales*; they preſently ſent their dunner to *Agris* to demand the money, but he put them off from time to time for about thirteen or fourteen days, though the

the dunner had been ſeveral times with him for the money; and afterwards *Agris* fails; it was proved in the cauſe, that *Agris* was ſolvent after the note given by Sir *Stephen Evans*, and had paid above 800*l.* to ſeveral people; upon *Agris*'s failing, the plaintiff applies to the defendants, Sir *Stephen Evans* and *Hales*, for payment of the 150*l.* Sir *Stephens* not thinking himſelf obliged to pay it, ſends the plaintiff to *Berkley*, to whom the note was firſt given, and he likewiſe refuſing payment, the plaintiff brought his bill againſt them for a ſatisfaction, and had a decree at the rolls, to charge Sir *Stephen Evans* and *Hales*; from which decree they appealed to my lord keeper; and inſiſted they were not chargeable with this money; that they took *Agris*'s note only as ſervants to the plaintiff, and had ſeveral times ſent their dunner to demand the money; that his promiſing them payment was the reaſon they did not give notice, nor return the note to the plaintiff; that their manner of giving notes in *Lombard-ſtreet* was different from thoſe given by goldſmiths at *Temple-bar*, yet in ſubſtance they were the ſame, and amounted to no more than a receipt for the two notes from ſuch perſons for ſo much money, which, when they received, they promiſe to be accountable for; that this bill was but in nature of an action of account againſt them as bailiffs or receivers of ſo much money; and at common law, if ſuch action had been brought, and upon the trial it appeared they had received no money, the jury would have found againſt the plaintiff; that the reaſon that led Sir *Stephen* to give a note in ſuch a form, was a caſe *Mich.* 2 *Ann.* between *Ward* and him, where the caſe was, that the plaintiff *Ward* being indebted to one *Fellows* in the ſum of 60*l.* and having a note from Sir *Stephen Evans* for 100*l.* when *Fellows* came for his money, *Ward* ſends a ſervant with him to Sir *Stephen* with a bill of 100*l.* and ordered him to pay *Fellows* the 60*l.* and indorſe it off the 100*l.* note; but Sir *Stephen* having a note on one *Wallis* for 60*l.* 10*s.* gives that note to *Fellows*, who pays him the 10*s.* overplus, and goes away with the note; the next day *Wallis* fails; and upon an action brought by *Ward* for the 100*l.* the court of *B. R.* was of opinion that the delivery of the note upon *Wallis* for 60*l.* 10*s.* was no payment, and therefore *Ward* recovered the whole 100*l.* and therefore Sir *Stephen* now only gave a note for ſo much received on account; and the note in the margin, ſhewing from whom it was due, made it plain, he only acknowledged the receipt of ſuch notes, but had no deſign to charge himſelf with the money till it was received. But my lord Keeper was clear of opinion, that the note imported an acknowledgement of ſo much money received on the plaintiff's account; that the entry on the margin could at moſt only ſhew how it was received; and that the note ſpoke itſelf, whatever the forms and meaning of ſuch notes were, and therefore affirmed the decree. *Mich.* 1710. *Trowel* and *Sir Stephen Evans & al.*

CAP.

CAP. LII.

Trial.

(A) *In what Caſes a new Trial may be granted, or the* Venue *changed by a Court of Equity.*

1. THE defendant's wife had pawned her huſband's plate to the plaintiff for 110*l.* for which the defendant in trover had recovered 115*l.* damages againſt the plaintiff, and judgment for it; the plaintiff exhibited his bill to be relieved againſt the judgment, and to have a new trial, ſuggeſting that the defendant was privy to the pawning, and received the 110*l.* and the proofs being read, it appeared that the defendant had confeſſed ſo much; which if it had been proved at the trial, it was agreed the defendant could not have recovered on the trover; but there being no proof now, that the plaintiff at law could not, by reaſon of any accident, have his witneſſes at the trial, the court would not, on any neglect of his, grant a new trial. *Hil.* 15 & 16 *Car.* 2. *Curteſs* and *Smalridge*, 1 *Chan. Ca.* 23. 2 *Freem. Rep.* 178. S. C. and P.

Bills for changing the *Venue*, or for granting a new trial, are not reduced to any great certainty; the grounds for relief, in the firſt caſe, is partiality in the jurors; for though, by the law, the trial is to be by a jury *de vicineto*, yet if it appears that one of the parties is ſo powerful in intereſt in the county, and by that means the other is in danger of not having equal juſtice done him, the court will order the trial in an indifferent county. 1 *Vern.* 439, 267. Grounds for a new trial are, new evidence diſcovered, which could not poſſibly be made uſe of in the firſt *; perjury in the witneſſes, partiality in the jurors, &c. all which muſt be made out to the ſatisfaction of the court. *Vide* 1 *Chan. Ca.* 65.

* 2. But where an action was brought againſt an adminiſtrator, who pleaded *plene adminiſtravit*, and the trial was brought down by *proviſo*; and at the trial, the defendant being put to prove a ſum of 50*l.* paid before the plaintiff's original, which not being provided to do, a verdict was againſt him; yet after finding the note, whereby his witneſs was enabled to ſwear that matter, on a bill brought in chancery, a new trial was granted. *Hil.* 28 *Car.* 2. *Hannell* and *Kelland.*

3. So where a bill was exhibited for a new trial, ſuggeſting the plaintiff's mark to the bond was forged by one *Webb*, and that ſurprize the defendant had recovered againſt him at law, all the pretended witneſſes to the bond being dead; and a new trial was granted. *Mich.* 1691. *Coddrington* and *Webb*, *Vern.* 240.

* It is a rule, that the court will not ſet aſide a trial at law for any matter which might be made uſe of at the trial. 2 *Freem. Rep.* 178.

4. The

2 *Vern.* 378, 419. S. C.

4. The plaintiff's wife had a bond of 100*l.* entered into, to her, by her uncle, as a free gift (as she pretended) to be paid after his death; and this bill was brought to discover the obligor's assets, and to have a satisfaction out of the real and equitable assets. The defendant insisted the bond was forged, and therefore ought to have no countenance or assistance of a court of equity; and there were considerable proofs of its being so; so it went to law to try *factum vel non*, and found for the bond; and then the plaintiff came back to the court, and had a decree for a satisfaction out of the assets; for it was said, that the validity of the bond having been so solemnly determined at law where it was only triable, the plaintiff ought to have the common justice and assistance of this court. The defendant being dissatisfied with this decree, petitioned for a rehearing; and the cause coming to be reheard, the former decree was affirmed. The defendant pressed much for another trial, but that was denied; for it was said, if it were granted, and a verdict again the bond, the plaintiff might, with as much reason, ask another trial, and so matters would be made endless; besides it would be much more unreasonable to grant a new trial in this case, because several of the plaintiff's witnesses, who gave evidence at the former trial, were since dead; but the defendant being still more dissatisfied, appealed to the house of lords who granted a new trial, and it was found against the bond. *Hil.* 1700. *Wharton* and *Tilley*.

5. An issue was directed to be tried touching the custom of the manor of ——— which was found against the plaintiff; and the cause being heard on the equity reserved, it being alledged to be a cause of value, and concerning all the copyholds in the manor, a new trial was directed upon payment of costs. *Trin.* 1688. *Edwin* and *Thomas*, 2 *Vern.* 75. ——— 1 *Vern.* 489. S. *Vide* 1 *Vern.* 298. *where it is said, that upon one trial it was not proper to make a decree to bind the inheritance*.

6. But where the plaintiff, being a purchaser, came into equity for writings, and a partition of lands; the defendant insisted there was an intail, and the plaintiff's purchase not good; the court, on the first hearing, gave the plaintiff a year's time to try his title; and ejectment was brought, and a copy of the deed of intail was produced, but the original lost, and not proved to be executed; verdict against the intail; the cause being set down on the equity reserved, the defendant insisted, he ought not to be bound by one trial in a matter of right of inheritance, but the court refused him any relief, being only a decree for a partition; but the reporter adds a *quære tamen*. *Trin.* 16 *Bliman* and *Brown*, 2 *Vern.* 232.

2 *Atk.* 319. 378. *Pree. in Chan.* 193.

7. A Factor buys cheese for his principal, and then breaks and an action is brought against the principal, and a recovery at law; the plaintiff here endeavoured in the court of law, to have got a new trial, but was denied it; then he brought his bill, and suggested for equity, that before the cheese bought he had countermanded the authority of the factor, and that the defendant had notice of it; and that since the trial the plaintiff found that the principal witness, on whose testimony the recovery was had, was a partner with the insolvent factor, (which that was not proved); another suggestion was, that there co

not be an indifferent trial in *Suffolk*, for that almoſt all the freeholders there were concerned in intereſt, and had declared they would never find againſt their country-men; but the court refuſed to grant a new trial. *Paſch.* 1702. *Tovey* and *Young*, 2 *Vern.* 437.

CAP. LIII.

Truſt and Truſtees.

(A) *When a Truſt ſhall be ſaid to be raiſed.*
(B) *Of reſulting Truſts, or Truſts by Implication.*
(C) *What ſhall be a Truſt, and not an Uſe executed by the Statute.*
(D) *What Act of the Truſtee ſhall defeat the Truſt, or be a Breach of Truſt in him.*
(E) *What Act of the Truſtees jointly with* Ceſtui que Truſt, *or by* Ceſtui que Truſt *only, ſhall defeat the Truſt, or deſtroy contingent Remainders.*
(F) *When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.*
(G) *Truſtees how to Account, and what Allowances to have.*
(H) *How far Truſtees are anſwerable for each other.*

(A) *When a Truſt ſhall be ſaid to be raiſed.*

IF a man deviſes 1500*l.* to *A.* and *B.* for ſuch uſes as the teſtator had declared to them, and by them not to be diſcloſed, and he diſcloſes the truſt to *A.* who by letter diſcloſes it to *B.* this ſhall be a truſt, and the letter is a good declaration thereof, though either, or both the truſtees be dead. *Trin.* 1689. *Crooke* and *Brooking*, 2 *Vern.* 106.

When a truſt is well raiſed for payment of debts, *vide* deviſe for payment of debts, title *Deviſe*; reſulting truſts for the benefit of an heir, title *Heir*; where executors ſhall be truſtees for the next of kin, title *Executors and Adminiſtrators.*

2. But

Vid. ant. 2 *Equ. Abr.* p. 745. pl. 11.

2. But if a man deviſes 40*l.* to be paid to his couſin *J. S.* and by him to be diſpoſed of in ſuch manner as the teſtato ſhould by a private note acquaint him with, and dies withou having made any ſuch appointment; this ſhall be a good be queſt to *J. S.* and ſhall not go to the executors, from whom i was intended to have been given away. 1 *Chan. Ca.* 198.

3. If an impropriator deviſes to one that ſerved the cure, an to all that ſhould ſerve the cure after him, all the tithes an other profits, *&c.* tho' the curate is uncapable of taking by thi deviſe in ſuch manner, for want of being incorporate, an having ſucceſſion, yet the heir of the deviſee ſhall be ſeiſed i truſt for the curate for the time being. 2 *Vent.* 349. by *Finc* lord Chancellor.

4. *A.* lent *B.* 100*l.* and in the note which was given for i mention was made that it ſhould be diſpoſed of as *A.* ſhoul direct; on a bill exhibited for it, the court declared it was *depoſitum* or truſt, and decreed payment of it, tho' it was barre by the ſtatute of limitations. 2 *Vent.* 345.

5. *A.* in conſideration of 80*l.* conveys an eſtate abſolutely *B.* and afterwards *A.* brings a bill to redeem, and *B.* by anſw inſiſts that the conveyance was abſolute, but confeſſes, that af the 80*l.* paid, with intereſt, it was to be in truſt for the wi and children of *A.* and *A.* replies to the anſwer; though the be no other proof of the truſt, yet it will be decreed for the wi and children. *Paſch.* 1693. *Hampton* and *Spencer*, 2 *Vern.* 288.

6. So if *J. S.* makes his will, and his wife executrix, a the ſon afterwards prevails on his mother (by telling her th the executorſhip would be troubleſome to her, *&c.*) to get *J.* to make a new will, and name him executor therein, he pr miſing to be a truſtee for the mother, which is done accor ingly, and in that will there is but a ſmall legacy given t wife; this will be decreed a truſt for the wife on the point fraud, notwithſtanding the ſtatute of *frauds* and *perjuries*. 1684. *Thyn* and *Thyn*, 1 *Vern.* 296.

(B) *Of reſulting Truſts, or Truſts by Implication.*

1. IF a man purchaſes lands in another's name, and pays t money, it will be a truſt for him that paid the mon tho' there be no deed made, declaring the truſt thereof; for t (*a*) ſtatute of frauds and perjuries extends not to truſts rai by operation of law. 2 *Vent.* 361.—1 *Vern.* 366. S. P. a mitted; but there ſaid, *that the proof muſt be very clear, that paid the purchaſe-money.*

(*a*) By the 29 *Car.* 2. all declarations and creations of truſts of lands or hereditaments muſt be in writing, ſigned by the party, or by his laſt will in writing, or void; except truſts ariſing by implication of law, and transferred or extinguiſhed by ac law, which ſhall be of the ſame effect as if this act had not been made *.

2. If there are three leſſees of a church-leaſe, and one them ſurrenders the old leaſe, and takes a new leaſe in his o name, it ſhall be a truſt for all. *Mich.* 1684. *Palmer* and *Yo* 1 *Vern.* 276. *per Curiam.*

* *Note*; This relates to truſts and equitable intereſts, but not to an which is a legal eſtate. *per* lord Chan. 1 *Will. Rep.* 112.

3. *A.* and *B.* agreed together to take a leaſe of a *Colliery* for leſs than three years, for which they contracted at a certain rent, but by the agreement the leaſe was taken in *A.*'s name only; tho' at the time of the executing thereof, the leſſor inſiſted, that *B.* ſhould be a joint leſſee with *A.* and ſhould receive a moiety of the profits, and be anſwerable for a moiety of the rent, and refuſed to let it on any other terms, and accordingly demanded and received a moiety of the rent from *B.* On a bill brought by *B.* *A.* pleaded the ſtatute of frauds and perjuries, and that there was no declaration of a truſt in writing; *B.* inſiſted that it was good, being a leaſe for leſs than three years; or if his title was not good on that account, yet it was good as a reſulting truſt; as to the firſt, the court held, that tho' a leaſe for three years may be good by parol, yet when ſuch a leaſe is made in writing, the truſt of that leaſe cannot be declared by parol; and as to the ſecond, ordered the plea to ſtand for an anſwer; (the judge, who ſat in my lord chancellor's abſence, being in doubt about it, tho' he inclined to over-rule the plea.) *Mich.* 1682. *Riddle* and *Emerſon*, 1 *Vern.* 108.

Qu. as it doth not appear that the court declared any opinion about either point; both being the anſwers of the defendants counſel. *Prec. in Chan.* 80. S. C. *in totidem verbis.*

4. *A.*'s father had executed a grant of the next avoidance of a church to *B.* the defendant's father, who was a clergyman, and a perſon much intruſted and employed by him; and the grantee knew nothing of the making of this grant; and being examined in a cauſe had depoſed, that he did not purchaſe it; and it was held, that this was a reſulting truſt to the grantor, there being no other truſt declared. *Hil.* 1697. *The Duke of Norfolk* and *Brown.*

5. But if the mortgagee aſſigns over his mortgage to *J. S.* and declares a truſt thereof by parol for *A.* and *B.* there being in this caſe an expreſs truſt declared, though by parol only, it ſhall prevent a reſulting truſt to the aſſignor; for the ſtatute of frauds, which ſaves reſulting truſts, extends only to ſuch as were reſulting truſts before the ſtatute; and a bare declaration by parol before the act would prevent any reſulting truſt. *Trin.* 1693. *Lady Bellaſis* and *Compton*, 2 *Vern.* 294. *but no decree.*

6. If a father purchaſes lands in the name of his eldeſt ſon, this ſhall be an advancement for the ſon, and not a truſt for the father, though the father has been in poſſeſſion of it, and has received the rents and profits thereof. *H. l.* 28 *Car.* 2. *Lord Gray* and *Lady Gray*, 1 *Chan. Ca.* 296. 1 *Chan. Ca.* 27. S. P. 2 *Chan. Ca.* 231. S. P. (*a*), and there ſaid to be the conſtant rule.

(*a*) *Note*; In 2 *Chan. Ca.* 231. Chan. *Nottingham* took a diſtinction where a parent made a purchaſe in the name of an advanced child, and where in the name of a child already advanced. In the former caſe, it is only an advancement for the child, in the latter a truſt for the parent.

7. So where the lord of a weſt-country manor (his tenants refuſing to renew) made a leaſe to his daughter for ninety-nine years, and afterwards ſold the eſtate to *J. S.* who had notice of the leaſe and took a collateral ſecurity, that the daughter ſhould ſurrender within four years after ſhe attained her age of twenty-one years; and though it was inſiſted, that this was a truſt for the father, and that it was the uſual method, that lords of weſt-country manors took, when the tenant in poſſeſſion refuſed to renew; yet my lord chancellor held it no truſt for the father, but an advancement for his child; and that the purchaſer having purchaſed with notice of it, and taken a collateral ſecurity, he muſt make the beſt of his ſecurity. *Trin.* 1687. *Jennings* and *Selleck*, 1 *Vern.* 467. decreed.

8. So

8. So if a father purchaſes a copyhold tenement in the name of his eldeſt ſon, an infant of about eleven years old, and lays out 400*l.* in improvements, pays the purchaſe-money, and all the fines, and enjoys it during his life, (but having ſurrendered it to the uſe of his will) deviſes it to his wife for life, and after to his younger children, who were otherwiſe unprovided for; and the eldeſt ſon recovers in ejectment; the wife and children cannot be relieved againſt it, for the purchaſe ſhall be conſidered as an advancement for the ſon, and not a truſt for the father though he enjoyed it during his life; for the ſon was but an infant at the time of the purchaſe. *Paſch.* 1687. *Mumma* and *Mumma*, 2 *Vern.* 19. 2 *Vern.* 28. S. P. decreed.

2 *Freem.* 252. S. C. and decree. It is a ſettled rule, that whenever a father purchaſes in the name of a child unprovided for, it is intended a proviſion and not a truſt, unleſs it be otherwiſe proved, and the proof lies on the plaintiff; this was held ſo before the ſtatute of frauds, &c. and is ſtronger ſince, becauſe declarations of truſts ought to be in writing, tho' in other caſes a truſt will reſult where it appears that another paid the money. *Per Cur'*, *Ibid* 252, 253.

9. A man bought copyhold lands of the nature of borough *Engliſh*, in the name of his eldeſt ſon, but there was no declaration of truſt in writing; but the plaintiff would have had it as a truſt for the father, who, as well as the eldeſt ſon, were both dead; it was agreed the father paid the purchaſe-money and many witneſſes were examined on both ſides, and acts of ownerſhip, as receipts of rents, repairs, &c. proved in both father and ſon; ſo that the proofs as to that matter ſeemed to be pretty equal; but there being no declaration in writing, that it was a truſt for the father, the court decreed it an advancement for the ſon; which was affirmed in the houſe of lords. *Trin.* 1701. *Shales* and *Shales*.

10. So if a father purchaſes lands in his eldeſt ſon's name, and the ſon is put into poſſeſſion, who afterwards falls ſick, and in his ſickneſs the father gets him to execute a deed, declaring his name was made uſe of only in truſt for him; and the ſon recovers, and continues in poſſeſſion and marries; after his death his wife ſhall be endowed, notwithſtanding this declaration of truſt; and tho' the father had got a conveyance of the legal eſtate from the younger ſon; for this is a ſecret and fraudulent deed of truſt to deceive creditors and purchaſers. *Paſch.* 170 *Bateman* and *Bateman*. 2 *Vern.* 436.

11. If the grandfather takes bonds in the name of his grandchildren, the father being dead, this ſhall be an advancement for the grandchildren, and not a truſt for the grandfather; the father being dead, the children are under the immediate care of the grandfather. *Paſch* 32 *Car.* 2. *Ebrand* and *Dand* 2 *Chan. Ca.* 26.

(C) *What ſhall be a Truſt, and not an Uſe executed the Statute.*

1. IF lands are deviſed to truſtees and their heirs, in truſt for a Feme Covert, and that the truſtees ſhall from time to time pay and diſpoſe of the rents and profits to the ſaid Feme Covert, or to ſuch perſons as ſhe, whether ſole or covert, ſhall appoint, and that her huſband ſhall have no benefit thereof; and as to the inheritance, in truſt to ſuch perſons as ſhe by will or other writing under her hand, ſhould appoint; and for want

of ſuch appointment, to her and her heirs, this ſhall be a truſt; and not an uſe executed by the (*a*) ſtatute. *Mich.* 1685. *Nevil* and *Saunders*. 1 *Vern.* 415.

(*a*) By the 27 *H.* 8. *c.* 10. it is provided that the uſe and poſſeſſion ſhall be always united, by declaring, that where any are or ſhall be ſeiſed of any lands, &c. to the uſe or truſt of any other, by reaſon of any bargain or ſale, feoffment, fine, recovery, contract, agreement, will, or otherwiſe, by any means whatſoever, *Ceſtui que uſe*, or he to whoſe uſe the lands are ſettled in fee-ſimple, fee-tail, for life, years, or otherwiſe, or he who hath any uſe in reverſion or remainder, &c. ſhall be deemed to be in poſſeſſion of the land to all intents and purpoſes; and where one is ſeiſed of lands to the uſe or intent that another ſhall have an yearly rent out of the ſame lands, *Ceſtui que uſe*, or he to whoſe uſe the rent is granted, ſhall be deemed in poſſeſſion thereof, *viz.* of the rent, and of like eſtate, as he that had the uſe. But notwithſtanding this ſtatute, there are three ways of creating an uſe or a truſt, which ſtill remains as at common law, and is a creature of the court of equity, and ſubject only to their controul and direction: *1ſt*, Where a man ſeiſed in fee raiſes a term for years, and limits it in truſt for *A.* &c. for this the ſtatute cannot execute, the termor not being ſeiſed. *2dly*, Where lands are limited to the uſe of *A.* in truſt to permit *B.* to receive the rents and profits; for the ſtatute can only execute the firſt uſe. *3dly*, Where lands are limited to truſtees to receive and pay over the rents and profits to ſuch and ſuch perſons; for here the lands muſt remain in them to anſwer theſe purpoſes; and theſe points were agreed to. *Trin.* 1700. *Symſon* and *Turner*; *per Curiam.*

2. But where a man deviſed the rents and profits of certain lands to *T. B* the wife of *W. B.* during her natural life, to be paid by his executors, into her own hands, without the intermeddling of her huſband, and after her deceaſe he deviſed them to others; and it was held by *Rokeby* and *Eyre* juſtices, that the lands themſelves belonged to the wife, againſt *Holt*. Ch. Juſt. who held ſtrongly, that the executors were only truſtees for the wife. *Trin.* 1 *W. & M. South* and *Allen in B. R.* 1 *Salk.* 228.

1 *Saund.* 186. 1 *Eq. Ab.* 188. *Fearne* 303. 432. *Swinb.* 180. *Powell* on dev. 258. 2 *Com. Dig.* 41. *Comb.* 375. and 5 *Mod.* 63. —*Ibid.* 98, 103. S. C. adjudged by two J. againſt the opinion of *Holt* ch. J.

3. If lands are deviſed to truſtees and their heirs, on truſt to permit *A.* to take the profits for his life, and after the truſtees to ſtand ſeiſed to the uſe of the heirs of the body of *A.* *A.* has no eſtate-tail executed in him; for this being a plain truſt at common law, what is ſo, muſt be executed by the ſtatute, which mentions the word *truſt* as well as *uſe*. *Broughton* and *Langley*, 2 *Salk.* 679. 1 *Lut.* 823. S. C. and *per Holt* ch. juſt. the ſame point *cont.* in the caſe of *Burchett* and *Durdant*, 2 *Vent.* 312. is not law.

Ld. *Raym.* 874. &c.

* 4. But where lands were deviſed to truſtees and their heirs, in truſt to pay ſeveral legacies and annuities, and to pay the ſurplus of the rents and profits to a married woman, during her life, for her ſeparate uſe, or as ſhe ſhould direct; and after her death the truſtees to ſtand ſeiſed to the uſe of the heirs of her body, with remainders over; and the queſtion was, whether this deviſe to pay the ſurplus of the rents and profits to the wife, was ſuch a uſe or truſt as was executed by the 27 *H.* for if it was, then it was urged, that ſhe being tenant for life, the limitation after to the heirs of her body being coupled with it gave her an eſtate-tail, according to *Shelley*'s caſe, 1 *Co.* but if it did not, then the eldeſt ſon was to take as a purchaſer; and it was held by the court, that ſhe had only a truſt for life, and conſequently the heirs of her body muſt take by purchaſe; and the rather in this caſe, becauſe it was limited to the heirs of her body ſeverally and ſucceſſively, as they ſhould be in ſeniority of age and priority of birth, and the heirs of their reſpective bodies iſſuing; and a difference was taken between this caſe and that of *Broughton* and *Langley*, 2 *Salk.* for there it was to permit *A.* to receive the rents and profits for life; but here is a truſt in the truſtees, to pay over the rents and profits to ſuch

ſuch and ſuch perſons; and therefore the eſtate muſt remain in them to anſwer theſe truſts; otherwiſe ſhe muſt be the truſtee, contrary to the expreſs words of the will. *Mich.* 1728. *Jones* and *the Lord Say and Seal* decreed, and affirmed in the houſe of lords.

(D) *What Act of the Truſtee ſhall defeat the Truſt, or be a Breach of the Truſt in him.*

1. IF *A.* ſeiſed in fee, in truſt for *B.* for full conſideration conveys to *C.* who has notice of the truſt; and afterwards *C.* to ſtrengthen his own eſtate, levies a fine to *B.* the *Ceſtui que truſt* is not bound to enter within five years; for *C.* having purchaſed with notice, notwithſtanding any conſideration paid by him, is but (*a*) a truſtee for *B.* and ſo the eſtate not being diſplaced, the fine cannot bar. 1 *Vern.* 149. agreed *per curiam.*

(*a*) Truſts are ſo far regarded and ſupported in equity, that regularly no act of the truſtee ſhall prejudice the *Ceſtui que truſt*; for though a purchaſer for valuable conſideration, without notice, ſhall in no caſe have his title impeached in equity; yet the truſtee muſt, eſpecially in equity, make good the truſt; and my lord *Hobart* is of opinion, that an action lies againſt him at common law; but if he purchaſes, with notice, then he becomes the truſtee himſelf, and ſhall be accountable for every act of his, as the truſtee was, and if either becomes inſolvent, the *Ceſtui que truſt* has his remedy againſt the other. The truſtee of a legacy dying before the legacy is paid, ſhall not prejudice the legatee; ſo if a truſtee of land die without heir, though the lord by eſcheat will have the land at law, yet it will be ſubject to the truſt in equity. *Trin.* 1702. *Eales* and *England*; ſo if *A.* puts out 100*l.* at intereſt in the name of *B.* who after becomes a *felo de ſe*, *A.* may be relieved againſt the king upon his truſt, in equity, upon the ſtatute of 33 *H.* 8. *cap.* 39. *vide Hard.* 176, 460, 395, 468 *Lane* 54.

2. So if an executor, in truſt for an infant reſiduary legatee, renews a leaſe, part of the teſtator's perſonal eſtate, in his own name, and firſt mortgages it, and then aſſigns the equity of redemption to a truſtee, to ſell for payment of his own debts, and his truſtee ſells to one who had notice of the infant's title, the purchaſe will be ſet aſide. *Mich.* 1687. *Walley* and *Walley* 1 *Vern.* 484. decreed.

3. If a truſtee ſells the land to a ſtranger, who has no notice of the truſt, and a fine and proclamation, and five years paſs, and the truſtee afterwards, for valuable conſideration really paid, purchaſes theſe lands again from the vendee, the vendee notwithſtanding the fine, *&c.* ſhall ſtand ſeiſed as at firſt, and as if the land had never been ſold. *Mich.* 34 *Car.* 2. *Bovey* and *Smith*, 1 *Vern.* 60, 61, 144. 2 *Chan. Ca.* 124. S. C.

(E) *What Acts of the Truſtee, jointly with* Ceſtui que Truſt, *or by* Ceſtui que Truſt *only, ſhall defeat the Truſt, or deſtroy contingent Remainders.*

1. IF truſtees in a ſettlement, to ſupport contingent remainder (*a*) join with the tenant for life in any conveyance, to a ſtr

Prec. Ch. 308. *Salk.* 680. 1 *Bro. P. Ca.* 359. 1 *Vez.* 95. 524. 1 *Atk.* 614. 3 *Atk.* 24. 754. *Brown's Rep.* 109. 1 *Will. Rep.* 128. S. C. ſaid to be ſo declared by lord Keeper *Harcourt.* (*a*) But if a truſtee joins with a *Ceſtui que truſt* in tail in any conveyance to bar the intail, this is no breach of truſt; for it is no more than what he may be compelled to, tho' the truſtee himſelf might have barred ſuch intail without his joining; and that not only by fine or recovery, but likewiſe by feoffment, bargain or ſale, deviſe or ſurrender (if the intail be of a copyhold, and there is no particular cuſtom which requires a common recovery); for ſuch intail is not within the ſtatute *de donis*, but remains as at common law; and being a truſt is governable only by the rules of equity, and not by the niceties of the law; and this ſeems to be ſupported not only by the latter, but by the far greater number of authorities, and in caſes wherein the very point itſelf was debated, tho' there are *obiter* ſayings and opinions which have made ſome diſtinctions, and others which have flatly contradicted it. *Vide* 1 *Ch. Ca.* 49. 2, 3. 1 *Chan. Rep.* 68. 2 *Chan. Ca.* 78, 84. 1 *Vern.* 13, 440. 2 *Vent.* 350. 2 *Vern.* 583, 702.

roy the contingent remainders before they come *in eſſe*; this is a plain breach of truſt; and whoever claims under ſuch conveyance, having notice of the truſt, or by a voluntary ſettlement, ſhall be liable to make good the eſtates. *Mich.* 9 *Ann.* Eye and *Georges*, 2 *Sal.* 680. *Vide* the caſes *infra*.

2. But where a ſettlement was made in conſideration of a marriage, and 3000*l.* fortune, and for ſettling the lands in queſtion in the name and blood of the huſband; and the lands were limited to truſtees in truſt for the intended huſband for 99 years, if he ſhould ſo long live, remainder to truſtees during his life, to ſupport contingent remainders; (*b*) remainder to the firſt and other ſons of that marriage, (*b*) (*a*) remainder to the heir of the body of the huſband, (*a*) (*b*) remainder to the firſt and other ſons of that marriage, (*b*) (*a*) remainder to the right heirs of the body of the huſband, (*a*) remainder to the right heirs of the huſband; the marriage took effect, and the huſband and wife and truſtees to ſupport, *&c.* by fine and other conveyance ſettle theſe lands on the huſband for ninety-nine years, if he ſhould ſo long live; remainder to truſtees during his life to ſupport contingent remainders; remainder to the wife for her life, for her jointure, remainder to the firſt and other ſons of that marriage, remainder over to ſeveral others; and then the huſband and wife died without iſſue; and the plaintiff being heir at law to the huſband, brought his bill to ſet aſide this ſecond conveyance by the truſtees, as being made in breach of their truſt; and inſiſted, that they were truſtees, as well for the ſupport of this remainder as of the remainder to the firſt and other ſons, all being contingent remainders; and that ſuch conveyances ought to be ſet aſide, as has been the practice of this court, at leaſt the opinion of the court theſe twenty years paſt. Lord Chancellor held it to be ſo as to the firſt and other ſons, who came in, and were to be conſidered as purchaſers under the marriage-ſettlement and portion; and ſaid it would be dangerous for any truſtees to make the experiment, for that it was moſt certainly a breach of truſt; and if it ſhould ever come in queſtion, he thought this court would ſet aſide ſuch a conveyance, not but that he ſaid the caſe might poſſibly be ſo circumſtanced, as that this court would not relieve againſt it; but where relief is to be given, in ſuch caſe, it is only to thoſe who come and claim as purchaſers, as the firſt and other ſons, but all the remainders after to the heirs of the body of the huſband, remainder to his right heirs, are meerly voluntary, and not to be aided in this court; and therefore diſmiſs'd the bill. *Mich.* 1713. *Tipping* and *Piggot*.

Gilb. Eq. Rep. 34. S. C. *in totidem verbis.* See *Trevor* and *Trevor*, *P.* 387. *pl.* 7.

Qu. if the remainders marked (*a*) (*a*) be not ſynonimous, and plain tautology? and alſo thoſe marked (*b*) (*b*)?

(*a*) *Vide* 1 *Lev.* 237. *Jenkins* and *Keymis*, which ſeems *cont'*.

3. So if a ſettlement on a marriage-treaty be made on the huſband for ninety-nine years, if he live ſo long, remainder to truſtees to preſerve contingent remainders; remainder to the heirs of the body of the huſband by the wife, remainder to the heirs of the huſband; and there is iſſue two ſons and a daughter; and the wife being dead, the huſband and truſtees join with the eldeſt ſon in a fine or feoffment to *J. S.* this is a good bar of the truſt-eſtate, and the truſtees joining is no breach of truſt, for they were truſtees purely for the tenant in tail, and to preſerve his eſtate, and not to ſtand in oppoſition to him for the behoof of thoſe who were to come after him. *Mich.* 1717. *Elice* and *Oſborne*, 2 *Vern.* 754.

1 *Will. Rep.* 387. S. C. reported contra in the principal point, and *vid.* in 2 *Will. Rep.* 615. S. C. ſaid to be very unſatisfactory in *Vernon*.

* 4. *J. S.* by a marriage ſettlement was tenant for ninety nine years, if he ſhould ſo long live, with remainder to truſtees and their heirs during his life to ſupport contingent remainders, with remainder to his firſt and every other ſon ſucceſſively in tail male, remainder to truſtees for 500 years, in truſt to raiſe portions for daughters, if there were no iſſue male, or that ſuch iſſue male died without iſſue before twenty-one; *J. S.* had iſſue a ſon, and being of age and about to marry, he and his father bring a bill to have the truſtees join in making a eſtate, in order to ſuffer a common recovery, that he might be enabled to make a ſettlement on his marriage. And it was urged, that the truſtees were only truſtees for the ſon, and ought to execute eſtates as he ſhould direct, he having the inheritance in him; and that the end of the truſt was to hinder the father from defeating the ſon of the eſtate. On the other ſide it was urged, that theſe truſtees were not only truſtees for the eldeſt ſon, but were deſigned as a guard to the whole ſettlement; that the mother being living, there might be other children; and for the truſtees to join, would be a breach of truſt; and if there ſhould be daughters, they would by this means be entirely ſtript of their portions; and tho' the term for raiſing them was unſkilfully drawn in putting it behind the eſtate-tail to the ſon, yet this court had ſet it ſometimes before thoſe eſtates. The ſon being a daughter, in this caſe, my lord *Harcourt* directed upon giving ſecurity for the daughters portion, that the truſtees ſhould join in the recovery. *Trin.* 11 *Ann. Frewin* and *Charlett*.

5. By a marriage ſettlement lands were ſettled on the husband and wife for life, remainder to truſtees to preſerve contingent remainders, remainder to their firſt and every other ſon in tail male; and the huſband and wife being married twelve years, and having no iſſue, and having contracted debts, they bring a bill, and pray that they may be enabled to ſell part of the lands for payment of the debts; and the truſtee conſented, provided he might be indemnified; and though it was urged that there were precedents of like caſes; yet my lord chancellor refuſed to make any ſuch decree, ſaying, he had known people married near twenty years without iſſue, and after had children; but at the importunity of counſel, gave them time to attend him with precedents. *Trin.* 1683. *Davies* and *Weld.* 1 *Vern.* 18.

6. But where *A.* having mortgaged his lands, and alſo confeſſed a judgment, and he afterwards, on a marriage-treaty, ſettled the lands thus incumbered to the uſe of himſelf for life, remainder to truſtees to ſupport contingent remainders, remainder to his wife for life, remainder to his firſt and other ſons in tail, remainder to his own right heirs, and having no iſſue, articled to ſell the lands to *J. S.* who brought a bill for a ſpecifick performance of the agreement, and ſuggeſted that the truſtees refuſed to join, and that the mortgagee threatened to enter; and it was decreed, that the truſtees ſhould join and be indemnified, the eſtate being in an equity of redemption only; and there being no iſſue, (tho' the huſband and wife were married ſix years) and the wife by her examination in court conſenting freely thereunto. *Mich.* 1693. *Platt* and *Sprigg*, 2 *Vern.* 303. But *note*; thoſe ſettlements can rarely be broke through but by an act of parliament.

S. C. cited and examined in 2 *Will. Rep.* 616, 7.

7. Sir *John Trevor*, late maſter of the rolls, being ſeiſed of the eſtate in queſtion, which was the antient eſtate of the family, and of the value of 239*l. per ann.* or thereabouts, on his marriage with *Jane Puleſton*, widow, enters into articles the 23d of *October* 1669, with the ſaid *Jane*, and with *William Saliſbury* and Sir *Richard Loyd*, as her truſtees, whereby, in conſideration of the intended marriage, and of the love and affection he had and bore to the ſaid *Jane*, and the heirs males of their two bodies, he doth for himſelf, his heirs, executors and aſſigns, covenant, promiſe and grant, with the ſaid truſtees, their heirs and aſſigns, that he would, at his own coſts and charges, before the end of two years next after the date hereof, at the requeſt of the ſaid truſtees, their heirs and aſſigns, ſettle, convey and aſſure to the ſaid truſtees and their heirs, as they or their heirs, or their counſel, ſhould direct and appoint, the lands in queſtion, to the ſeveral limitations and uſes in theſe preſents mentioned and expreſſed, and alſo to the ſaid ſettlement and conveyance, as ſhall be agreed on by the ſaid Sir *John Trevor*, *William Saliſbury* and Sir *Richard Loyd*, and to no other uſe or uſes whatſoever, *viz.* to the uſe of Sir *John Trevor* for life, without impeachment of waſte, and after his deceaſe, to the uſe of the ſaid *Jane Puleſton* for her life, and after her deceaſe, to the uſe of the heirs males of the body of the ſaid Sir *John Trevor*, upon the body of the ſaid *Jane Puleſton*, to be begotten, and the heirs males of ſuch heirs males iſſuing; and for default of ſuch iſſue, to the uſe of the right heirs of Sir *John Trevor* for ever, with a covenant from Sir *John Trevor* with the truſtees and their heirs, that the ſaid premiſſes ſhall remain to the ſaid *Jane Puleſton*, during her natural life, after the death of the ſaid Sir *John Trevor*, free from all incumbrances, and a covenant in the words following: and the ſaid Sir *John Trevor* doth further, for him and his heirs, grant and agree with and with the ſaid *William Saliſbury* and Sir *Richard Loyd*, their heirs and aſſigns, that in caſe the uſes and limitations in theſe preſents are not hereafter well and truly raiſed, according to the true intent and meaning of theſe preſents, that then the ſaid Sir *John Trevor*, and his heirs, ſhall ſtand and be ſeiſed of all and ſingular the ſaid premiſſes, until ſuch time that a further aſſurance of the ſaid premiſſes be made, to ſuch uſe and uſes, intents and purpoſes, as herein before-mentioned, expreſſed and declared; and ſoon after the marriage took effect, and Sir *John* had iſſue by the ſaid *Jane* the plaintiff, his eldeſt ſon, the defendants three younger ſons, and two daughters. Theſe articles were laid by for ſeveral years, and nothing farther done upon them; but in 1692, Sir *John Trevor* levies a fine of thoſe lands; and the two truſtees being dead, without having ever requeſted a ſettlement, the plaintiff, ſome time after this fine, marries againſt his father's conſent, and by ſeveral other acts of weakneſs and diſobedience, became ſo obnoxious to his father, that 29 *Septemb.* 1699, Sir *John Trevor* makes a deed, wherein he recites theſe articles, that he had thereby agreed to ſettle and convey theſe lands to the uſe of himſelf for life, remainder to the ſaid dame *Jane* his wife for life, remainder to the heirs males of his body on the body of the ſaid dame *Jane* to be begotten; and reciting that his ſon (*Richard* the plaintiff) was very weak and diſordered in his

1 *Will. Rep.* 622. S. C. 2 *Mod. Ca. in Law. and Eq.* 161. S. C. 2 *Eq. Ab.* 475. *Pl.* 5. 9 *Mod.* 161. 10 *Mod.* 436.

underſtanding, and that all methods to improve him had bee ineffectual; and alſo reciting, that he had married with ſtrange woman, and thereby brought diſgrace on his family to the ruin thereof; and that he was of a furious ſpirit toward his brothers and ſiſters; therefore, and for ſeveral other cauſe and conſiderations, Sir *John* declares, that it was the intent an meaning of the ſaid parties, at the time of levying the ſaid fine that the ſame ſhould be and enure to the uſe of himſelf for life without impeachment of waſte, then to the uſe of the ſaid dam *Jane* for life, remainder to the defendant *John Trevor*, his ſe cond ſon, and the heirs males of his body, with like remain ders to *Arthur* and *Tudor Trevor*, his two youngeſt ſons, with remainder to his own right heirs; and a *proviſo*, that if any his three younger ſons ſhould marry without his conſent, tha then he ſhould have power to demiſe or leaſe the ſaid premiſſ for the term of 500 years, reſerving rent or no rent, as h thought fit, to any perſon or perſons he ſhould think fit; an the 16th of *October* next following, he makes a like ſettleme of other lands, of the value of 630*l.* *per ann.* and upwards, an the 20th of *May* 1717, dies inteſtate, leaving a perſonal eſta to the value of about 40000*l.* and alſo a real eſtate in *Irelan* of the value of 750*l.* or thereabouts, being let out on leaſes f lives, and worth to be ſold, about 24000*l.* and alſo ſome ne purchaſed lands in *England*, of the value of 300*l.* *per ann.* thereabouts; and by his death the now purchaſed lands, an the eſtate in *Ireland*, deſcended to the plaintiff, his eldeſt ſo who alſo became intitled to his ſhare of the perſonal eſta which amounted to upwards of 9000*l.* After his death *Jo Trevor* entered on the lands ſettled on him as aforeſaid, f which he being provided for beyond his ſhare of the perſon eſtate, could have no part thereof, by reaſon of the ſtatute diſtributions; and this conſiderably augmented the ſhares *Edward* the eldeſt ſon, and the other brothers and ſiſters; no withſtanding which the plaintiff, the eldeſt ſon, brought h bill to have the truſt performed, and a ſpecifick execution theſe articles, and that the lands compriſed in the articles m be conveyed to him, and the heirs males of his body, accor ing to the purport of the ſaid articles, and to have a diſcovery the deeds and writings, and an account of the rents and pr fits from the time of his father's death. It appeared that th articles had been thrown by for ſeveral years as uſeleſs, a were, after Sir *John Trevor*'s death, found at the bottom an old trunk; but the plaintiff having gotten the ſame in his cuſtody brought this bill for a ſpecifick performan thereof.

For the defendants it was inſiſted, that though by the fi part of the articles they ſeemed to be only executory, yet the laſt part, by the covenant to ſtand ſeiſed, that they w actually and immediately executed; that he thereby covena ed to ſtand ſeiſed to the before-mentioned uſes, till a ſettlem was made thereof accordingly; that no ſuch ſettlement hav ever been made, the uſes continued to be executed by virtue that covenant; that by theſe uſes he was plainly tenant in t then by the fine had bound his iſſue, and made himſelf ma of this eſtate, which he might ſettle and diſpoſe of as thought fit; that he was tenant in tail, appeared from t that if a ſettlement had been made purſuant to the very wo

f the articles, he had an eſtate-tail in himſelf; that wherever he anceſtor takes an eſtate for life, and afterwards in the ame deed, a limitation is made to the heirs males or heirs fe-ales of his body to be begotten; that in ſuch caſe the heirs ales, or his heirs females, take by deſcent, and not by pur-haſe; that this is a known and ſtanding rule of law which has ever yet been ſhaken; that the limitation after to the heirs ales of ſuch heirs males was tautology, and of no uſe; that was ſaying no more than what the law would have ſaid with-t theſe words; and therefore, if there were two ſuch limita-ons one after another, they would not impeach or controul the ſt limitation; and this appears clearly by *Shelley*'s caſe, 1 *Co.* d in a caſe of * *Legat* and *Shewell* in this court, where the dges of *C. B.* by certificate under their hands, gave their opi-ns accordingly, that the ſettlement being actually executed, e law was open, and the plaintiff had no occaſion to come into court for a ſpecifick execution of what was already executed; t this was plain from the covenant, that the wife ſhould en-during her life, free from incumbrances, and this covenant s not go to the whole eſtate agreed to be ſettled, but only to eſtate for life of the wife; that if the iſſue were intended to e as purchaſers, this covenant would have been extended to the ole eſtate, as the iſſue under this marriage contract were pur-ſers of it, as well as the wife; but the heirs males of the body Sir *John Trevor* coming in only by virtue of the intail, it would e been vain and idle to have carried that covenant beyond the te for life of the wife, becauſe it would only be a covenant himſelf; that the clauſe without impeachment of waſte did neceſſarily argue an eſtate for life in Sir *John Trevor*; that as for the ſake of the intervening jointure to his wife, which uld have obſtructed that power without expreſs words; and might have been enjoined from waſte in this court, for the ſervation of her jointure, if he had not reſerved to himſelf expreſs liberty of committing waſte; that this court was not nd in all caſes to carry articles executory (admitting theſe re ſo) into execution; that if the nature and circumſtances he caſe were ſuch as to make it unequitable and unconſcion-, this court would never decree a ſpecifick execution of cles; that in this caſe it was unreaſonable to aſk aſſiſtance his court, when ſo much greater compenſation was to come he plaintiff; that by the deſcent of ſo great a real eſtate, and acceſſion of ſo great a ſhare of the perſonal eſtate the plain-was abundantly recompenſed for the value of the eſtate in tion; that it was in Sir *John Trevor*'s power to have prevent-im of either, and his not doing it was equivalent to an ex-s deviſe thereof to him, and therefore ought to be looked s a ſatisfaction; that in the caſe of *Blandy Wigmore* in this t, where the huſband, before marriage, gave a bond to his wife worth 500*l.* if ſhe ſurvived him, and he after-s died inteſtate, and her diſtributive ſhare came to above this was adjudged a ſatisfaction of the bond; that Sir *Trevor* plainly took it he had a power over this eſtate; his judgment was ſo well known, that he never would have mpted it, if he had not thought it clear; that the diſobedi-and behaviour of his ſon, the plaintiff, were ſuch, as put under a neceſſity of conſidering the nature and extent of power over this eſtate; and ſince he, who was ſo good a judge

* *Vide* this caſe, *infra* letter (F) caſe 7. reported *cont'*.

judge in caſes of this nature, had diſpoſed of the eſtate, th
court would preſume he had power ſo to do, and that the m
tives of his proceeding herein were juſt and warrantable.

But notwithſtanding theſe reaſons it was decreed for the plai
tiff. Lord Chancellor ſaid, this caſe ought to be conſider
now as if this bill had been brought within two years after t
making of the articles; that if a bill had been then broug
there could have been no doubt but that a ſettlement muſt ha
been decreed purſuant to the intention of the articles; that up
articles the caſe was ſtronger than on a will; that articles we
only minutes or heads of the agreement of the parties, a
ought to be ſo modelled when they come to be carried into ex
cution, as to make them effectual; that the intention of t
parties was only to give Sir *John Trevor* an eſtate for life; th
if it were otherwiſe, it would have been vain and in
fectual; and it would have been in his power, as ſo
as the articles were made, to have deſtroyed them; that th
the conſideration of love and affection which he had to *J*
and the heirs males of their two bodies, would have run th
that he did, in conſideration thereof, ſettle an eſtate on hi
ſelf, which he might give away from his heirs males whene
he thought fit; that this was much ſtronger, by reaſon of
limitation, and to the heirs males of ſuch heirs males iſſui
that the conſtruction contended for by the defendant, wo
make theſe words perfectly uſeleſs and idle; that he did ind
admit it to be ſo reported in *Shelley*'s caſe, 1 *Co.* but he ſaid,
that was not at all material to the principal point in queſt
there. 2*dly*, that in *Anderſon*'s report of that caſe, nothing
it was taken notice of; and he ſaid, that few or none of
points reported by my lord *Coke*, were the reſolutions of
court. 3*dly*, that the reaſon of that caſe was, for that if it
veſted in the eldeſt ſon by purchaſe, and that heirs ma
of the body ſhould have only been a deſcription of a per
that then, if he had died without iſſue, there had been (as
then held) an end of the eſtate-tail, and none of the youn
ſons could have ſucceeded to it; but this has been held oth
wiſe ſince that time, and a judgment in point, in *Carter's Rep*
(as he remembred) that the eſtate-tail ſhould go to all the
ſucceſſively, notwithſtanding its veſting in the eldeſt ſon by p
chaſe; that he did not know how the caſe of *Legatt* and *Sh*
ell was; but if it were as cited, he thought it not law; t
the intention of the articles was plain, to make the iſſue of
marriage purchaſers; that they were wholly relative to a
ſequent ſettlement to be made; that the agreement to ſettl
the uſes therein, and alſo in the ſaid ſettlement to be agr
upon, could only be intended ſuch other uſes as were neceſ
to make the ſettlement effectual; and that it could neve
intended other uſes inconſiſtent with, and repugnant to th
articles; that if that had been their intent, it had been in effect
an agreement with the truſtees to ſettle thoſe lands as he thou
fit; that the other uſes to be agreed upon, muſt not be ſuc
would overthrow the preſent uſes, but ſuch as would eſtab
and ſupport them; that this could only be by a limit
on to truſtees to ſupport the contingent remainders; that
limitation to the heirs male of his body was in effect but
mitation to his firſt and other ſons; and if the articles had b
ſo penned, would not this court have decreed a limitatio
truſtees to preſerve them? or if by fine, or otherwiſe, they

been deſtroyed before they took place, would not this court have ſet them up again? that the limitation to the heirs males of his body, upon theſe articles, was but a contingent remainder, and yet ſuch as within the intent of the parties ought to be preſerved; that the covenant to ſtand ſeiſed was until ſuch time as the uſes therein were well and truly raiſed, according to the true intent and meaning of the articles; that if a ſettlement had been made defective in any particular, that would not have been final or concluſive; that a ſecond ſettlement muſt have been made till the uſes therein were well and truly raiſed; that this covenant for ever ſubſiſted till ſuch ſettlement were made; that he did not believe that it was Sir *John Trevor*'s opinion, that he was abſolute maſter of this eſtate, and might diſpoſe of it as he thought fit; that if that had been his opinion, he would have thought it ſufficient to have levied a fine thereof, without tranſmitting down his ſon to poſterity with ſuch a blemiſh; that the reaſon of that could only be to diſcourage his ſon from attempting to break into the ſettlements he had made of this eſtate; that if it were otherwiſe, he thought it no imputation on Sir *John Trevor*'s judgment; that the provocations he might be under from his ſon's diſobedience and miſbehaviour might ſo far bias his judgment, as to inclinehim to think he had power over this eſtate; that he would not look on theſe ſettlements in 1699, as made by Sir *John Trevor*, maſter of the rolls, but as made by a father provoked by the undutiful behaviour of an eldeſt ſon; that he hoped never to ſee the time when this court ſhould ſo far have power as to judge what behaviour of a ſon ſhould amount to a forfeiture of his eſtate, and therefore thought, if the ſettlement had been made, no miſbehaviour of the ſon could amount to a forfeiture of it; that as to the eſtate deſcended on the eldeſt ſon, this came to him by accident; it was not given to him by his father in ſatisfaction of the articles; and there may happen a caſe where no eſtate at all may deſcend to an eldeſt ſon; and if a father, upon ſuch articles, ſhould have power to defeat an eldeſt ſon, and leave him no other proviſion, it would be of dangerous conſequence to eſtabliſh a precedent of ſuch a power; that though the eldeſt ſon in this caſe happened to be well provided for, ſo were the younger ſons too; and as they were ſufficiently provided for, there was the leſs reaſon to take away this from the eldeſt; that this eſtate being ſpecifically agreed to be ſettled, it was a truſt for the eldeſt ſon which he came here to have an execution of, and not to have a recompence or ſatisfaction for it; that this truſt paſſed with the lands into whoſe hands ſoever they came, and could not be defeated by any act of the father or the truſtees; and therefore decreed a conveyance to the plaintiff and the heirs males of his body, and an account of the profits from the father's death, and the deeds and writings to be delivered up. *Trin.* 1719. *Trevor* and *Trevor*. This decree was affirmed in the houſe of lords.

1 *Will. Rep.* 622. S. C. ſays, it was decreed that the ſecond ſon and his younger brothers and ſiſters ſhould join in a fine to plaintiff, the eldeſt ſon, to hold to him in tail, with remainders to the other ſons in tail ſucceſſively, according to the marriage articles. *In Dom' Proc'* this matter was greatly debated by lord Chan. and lord *Nottingham* for the decree, and lords *Trevor* and *Harcourt* againſt it; but it was affirmed without any diviſion. *Ibid.* 684.——2 *Mod. Ca. in Law and Eq.* 161. S. C. ſays, after a long debate the decree was affirmed *in Dom' Proc. Ibid.* 166.

(F) *When*

(F) *When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.*

* 1. A Huſband, as adminiſtrator to his wife, obtained a decree againſt the truſtees to raiſe her portion; but he being a younger brother, having made no ſettlement on her and having a ſon by her, the money was decreed to be raiſed and put out for his benefit for life, then to the ſon for life, and if he leave iſſue, then for ſuch iſſue; but if he dies without iſſue and the father ſurvive, he to have it. *Paſch.* 1700. *Wythan* and *Cawthorn*.

* 2. Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion ſhould be laid out in the purchaſing of lands, which ſhould be ſettled on the huſband and wife for their lives, and the life of the longer liver of them and after to the heirs of the body of the wife, by the huſband to be begotten; yet the maſter of the rolls decreed the ſettlement to be to the firſt and other ſons, &c. ſo as the huſband and wife might not have power to bar the iſſue. *Mich.* 1698. *Jones* and *Langhton*.

2 *Vern.* 428. S. C.

3. So where an eſtate was limited to *A.* and *B.* in truſt for *C.* and the heirs of his body; *Proviſo*, that if he die without iſſue then in truſt for *D.* for life, with remainders over; and *C.* brought his bill to have the truſtees make a conveyance of the legal eſtate to him, and that it might be to him in fee, to prevent his ſuffering a recovery; the truſtees by anſwer ſubmitted to the court but the other remainder-men, who were defendants, oppoſed the executing any legal eſtate to *C.* becauſe he would then ſuffer a recovery, and defeat the intent of the donor, which was that it ſhould be preſerved for them, in caſe *C.* had no iſſue they alledged, that *C.* had married improvidently, and was extravagant, and would ſpend the eſtate, and cited the caſe at the end of *Twine*'s caſe, 3 *Co.* where, if an improvident man makes a voluntary ſettlement, to put it out of his power to ſpend his eſtate, this ſettlement ſhall be ſupported even at law; and therefore a court of equity will never help an extravagant man to deſtroy ſuch a ſettlement as this; and that in the caſe of Sir *Fra. Gerrard*, the lord Chancellor *Jefferies* had refuſed to decree the truſtees for Sir *Francis* and the heirs of his body, with a remainder to a charity, to convey the legal eſtate, ſo as to enable him to ſuffer a recovery. On the other ſide it was ſaid, there was no reaſon my truſtee ſhould hold my eſtate, whether I will, or no; and that if a court of equity did not decree a conveyance in ſuch caſe, it would be eſtabliſhing a perpetuity; and that the conſtant courſe of this court is, that when money is given to be laid out in a purchaſe to be ſettled in tail, with remainders over, the court will decree the money to him that was to be tenant in tail, if he deſire it, to prevent circuity; but the maſter of the rolls decreed the truſtees to execute a conveyance to *C.* in tail, but would not decree the conveyance to be in fee, though preſſed to it; and he ſaid there may be many reaſons why a court of equity would not decree a conveyance at all,

all, in ſuch a caſe, ſometimes for a politick reaſon, as if it were to enable a nobleman to ſuffer a recovery, and leave the honour bare, without eſtate; or if the party were a notorious ſpend-thrift, or when the eſtate-tail was only by implication, as he ſaid he took it in Sir *Fra. Gerrard*'s caſe; and he thought it would be an ungodly thing in the truſtees to execute a conveyance of the legal eſtate in ſuch a caſe as this at the bar, without a decree of the court. *Hil.* 1701. *Saunders* and *Nevil. Note*; though the court would not decree a conveyance in Sir *Fra. Gerrard*'s caſe, yet he ſuffered a recovery as *Ceſtui que truſt* in tail, which was held good, and the eſtate enjoyed under it diſcharged of the charity. *Vide* 2 *Vern.* 702.

4. But where on a treaty of marriage, articles were entered into for ſettling lands on the huſband for life, remainder to the wife for life, remainder to truſtees to preſerve contingent remainders, with remainder to the heirs of the body of the wife by the huſband to be begotten, with other remainders over; and the marriage took effect; and a ſettlement was made to the huſband and wife for their lives ſucceſſively, remainder to truſtees to preſerve contingent remainders, remainder to the firſt ſon of that marriage, and the heirs of the body of ſuch firſt ſon; and ſo to the ſecond and other ſons of that marriage, in like manner, with a remainder to the heirs of the body of the wife *by her ſaid huſband* to be begotten. They had iſſue one daughter only, then the huſband died; and the wife married a ſecond huſband, and they both joined in a fine and recovery, by which the daughter being barred of her inheritance, brought her bill to carry the articles into execution; for that by the ſettlement care was taken of the *daughters* * purſuant to the intention of the articles: but no care was taken of the daughters in regard the limitation to the heirs of the body of the mother by the firſt huſband made her tenant in tail general, and conſequently at liberty to defeat her daughters, as ſhe has now done by this fine and recovery, which was contrary to the intention of the articles, which were to make an effectual proviſion for the iſſue of that marriage. But lord Chancellor ſaid, if no ſettlement had been made, and you had come hither to have inforced the making of one purſuant to the articles; 'tis true, this court would have taken care that the daughters ſhould likewiſe have been ſecured of the proviſion intended them by the articles, by limiting a remainder to the daughters and the heirs of their bodies to be begotten, on failure of ſons; (*a*) but here a ſettlement being actually made, and accepted by the parties, and in the proviſion for the ſons, ſtricter than the articles themſelves imported; and for the next remainder, it being limited in the very terms of the articles, he could now make no alteration in it; and though a difference was offered, where the ſettlement was made before marriage, and where after; that where it was before, this court would not interpoſe, as they might, where it was after marriage; yet the court had no regard to this diſtinction (*a*), but diſmiſſed the bill. *Paſch.* 1715. *Burton* and *Haſtings*.

Gilb. Eq. Rep. 113. S. C. and decree. *Gilb. Chanc.* 253, 4, 5, S. C. 2 *Mod. Gas. L. & Eq.* 131. S. C. *Vid.* 2 *Equ. Abr.* 39. pl. 2, & 40. pl. 3. where this doctrine (of decreeing ſtrict ſettlements in favour of daughters, ſpurſuant to marriage articles) is fully conſidered.

* *Les Sons.*

(*a*) In *Gilb. Rep.* 114. it is ſaid, but too haſtily diſmiſſed the bill. *Gilb. Hiſt. Chanc.* 255, 6. S. C. *vid. Bagg* vers. *Foſter*, 1 *Ch. Cas.* 188. 3 *Chanc. Rep.* 50. *Cont'* to what is below cited out of *Gilb. Rep.*

5. But where on a treaty of marriage between the defendant and the plaintiff *Joanna*, the defendant entered into a bond to the

Gilb. Eq. Rep. 114. S. C. under the name of *Nandike* and *Wilkes, in totidem verbis.*—*Note*; This decree was on a bond, where, tho' the penalty ſeems to have been the only ſanction intended for ſecuring the performance of the condition; yet a ſpecifick execution was decreed, and in ſuch a manner too as effectually to ſecure the iſſue from being defeated by making them purchaſers. *Gilb.* 114.

the plaintiff *Joſeph*, father of the plaintiff *Joanna*, with condition to ſurrender certain copyhold lands to the uſe of himſelf for life, remainder to the plaintiff *Joanna* for life, remainder to the heirs of their two bodies to be begotten, with remainder to the heirs of the huſband; the marriage took effect; and a bill was brought againſt the huſband to compel a ſurrender purſuant to the intent of this bond; and the huſband making default at the hearing was decreed to ſurrender to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to the uſe of their firſt and other ſons in tail general ſucceſſively, with a remainder to the daughters of their two bodies to be begotten in tail general; and that in the mean time, till ſuch ſurrender was made, the court declared that the copyhold land ſhould be held and enjoyed according to theſe uſes. *Paſch.* 1716. *Nandick* and *Wilkes.*

S. C. cited, 1 *Will. Rep.* 644. 3 *Will. Rep.* 231. *Sweetapple* and *Bindon.*

6. *W. B.* deviſed 300*l.* to her daughter *M.* to be laid out by her executrix in lands, and ſettled to the only uſe of her daughter *M.* and her children; and if ſhe died without iſſue, the lands to be equally divided between her brothers and ſiſters then living; the plaintiff married *M.* the legatee, and had iſſue by her, but ſhe and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and ſettled on him for life, as being tenant by curteſy, or in lieu of the profits of the lands might have the intereſt of the money during his life; and it was held by the court, that if it had been an immediate deviſe of land, *M.* the daughter would have been by the words in the will tenant in tail, and conſequently the huſband would have been tenant by the curteſy; and in caſe of a voluntary deviſe, the court muſt take it as they found it; although upon the like words in marriage-articles it might be otherwiſe, where it appeared the eſtate was intended to be preſerved for the benefit of the iſſue; and therefore decreed the money to be conſidered as lands, and the plaintiff to have the intereſt or proceed thereof for his life, as tenant by the curteſy. *Hil.* 1705. *Sweetapple* and *Bindon*, 2 *Vern.* 536.

Vid. 2. *Bac. Abr.* 61. *Gilb. Chan.* 258. 1 *P. Wms.* 87. 2 *Atk.* 246 247. 250. *Brown's Cha. Rep.* 194, 206. *Gilb. Dev.* 55. *Powell* on deviſes, 363. 1 *Burr.* 42. 45. *Cro.* 836. 1 *Will. Rep.* 87. *Eaſter* 1706. S. C. by the name of *Legate* and *Stowell*, ſays, *Trower Blincow* and *Dormer*, three of the judges of *C. B.* certified their opinion, that *B.* the nephew, by virtue of the ſaid will, had an eſtate-tail veſted in him; but *Tracy* J. was of opinion, that he had only an eſtate for life. The court not ſatisfied with the opinion of the three judges, directed that an ejectment ſhould be brought in *B. R.* in order to have the matter ſettled, but the parties agreeing, the queſtion was not determined. *Ibid.* 92. *Gilb. Eq. Rep.* 141. S. C. but S. P. does not appear. 2 *Vern.* 551. S. C. But the opinion of the judges does not appear, though they were to be attended with a caſe.

7. *A.* by will bequeathed the ſurplus of his perſonal eſtate to be laid out in a purchaſe of lands to be ſettled on *B.* his nephew for life, and after his deceaſe to the heirs males of the body of the ſaid nephew, and to the heirs males of the body of every ſuch heir male, ſeverally and ſucceſſively one after another, as they ſhall be in ſeniority of age and priority of birth; every elder and the heirs males of his body to be preferred before every younger; and for want of ſuch iſſue, to his brother *C.* the plaintiff, for his life, *&c.* in the ſame manner. *B.* the nephew, brought a bill to have an execution of the truſt, (but *C.* the plaintiff was no party to the ſuit) and had a decree, that an account ſhould be taken of the aſſets; that the eſtate ſhould be laid out in land, and that to be ſettled by the approbation of a maſter, according to the direction of the will; after the account was taken, *B.* petitioned the court, ſuggeſting, that if the

the money ſhould be laid out in a purchaſe, he was to be made tenant in tail of the land by the ſaid will, and might immediately bar it; and therefore prayed, that no purchaſe might be made, and obtained an order to that purpoſe, and had the greateſt part of the money paid him; but before the reſt was paid died without iſſue, having firſt made his will, and ſubjected all his real and perſonal eſtate to the payment of his debts; and this bill was brought by *C.* to have an account of the eſtate, and that it might be laid out in a purchaſe for his benefit; for that *B.* was not, by his uncle's will, to have been tenant in tail, as he alledged, and that the former proceedings were colluſive, and he no party to them, and ſo not bound by them. It was ſaid, it is plain, from the frame of the will, that the teſtator's meaning was, that his nephew *B.* ſhould be only tenant for life, and not have power to bar his iſſue; and then a court of equity will decree it to be ſettled according to the intent of the teſtator; and the caſe of *Leonard* and *Earl of Suſſex* was cited, and the common caſe of marriage-articles, where, tho' they were ſo worded, as that if a ſettlement were made in the preciſe words of them, the huſband would be tenant in tail, yet this court has decreed it to be ſettled on the huſband for life only, and then upon the firſt and other ſons. On the other ſide it was ſaid, if the latter words in this will ſignify any thing, it is no more than what is included in the firſt, *& expreſſio eorum quæ tacite inſunt nihil operatur*; that this therefore is an equitable eſtate, and may be barred by deed, *&c.* Lord Keeper: There having been a decree already in this caſe, it muſt depend on what it is at law; and I am inclined to think the judges there may take it to be an eſtate-tail; if it were *res integra*, I think the court had better in ſuch caſes decree the truſt to be executed according to the (*a*) letter, and let the other take what legal advantages he can; but that has gone too far to be diſturbed now the thing is done and not open to me; and there may be a parity of reaſon to have a conſtructive tenancy in tail and an expreſs one; and parity of reaſon to have an equitable tail bound by decree (not by deed) as a real one by recovery; where ſettlements are agreed to be made upon valuable conſiderations, this court will aid in artificial words, and make an artificial ſettlement; but I never knew it done for a bare volunteer; the doubt in *Shelley*'s caſe, 1 *Co.* aroſe about the word *heirs*; but, as I ſaid before, this muſt depend on what it is at law; therefore let a caſe be made, and I will deſire the opinion of the judges of the *C. B.* upon it. *Paſch.* 1706, *Legatt* and *Shewell. Note*; afterwards three of the judges certified their opinion, that *B.* the nephew had an eſtate-tail.

(*a*) It is now conſtantly held in chancery, that if lands are veſted in truſtees to the uſe of one and the heirs of his body, with remainder over, that the truſtees are not to convey a fee, but an eſtate-tail, though he will have power to bar the intail, when the conveyance is made to him, and it would avoid circuity; ſo if a ſum of money be appointed to be laid out in a purchaſe, and the lands to be ſettled in tail, the purchaſe and ſettlement ſhall be made accordingly, *and not the money paid the party* (*b*); for the remainder-man has a chance for the eſtate, in caſe the tenant in tail in poſſeſſion die without iſſue before any recovery ſuffered, which he might omit through ignorance or forgetfulneſs, or he may be prevented by death before he has compleated it.

* 8. *Henry Collingwood*, the plaintiff's brother, having married *Catharine Moreton*, the only daughter and heir at law of *George Moreton*, in order to pay off ſeveral debts which were charged on his own eſtate, and likewiſe ſeveral debts which were charged

(*b*) Yet in *Coleman*'s caſe, *Trin.* 11. 2. where *A.* left 1000*l.* to truſtees to purchaſe lands, to be ſettled on *B.* in tail, remainder to *C.* Upon petition his honour decreed the money to *B.* before purchaſe made. *MS. Notes.*

charged on his wife's eſtate, both by her father and her two brothers, who were dead, and alſo by herſelf, by leaſe and releaſe and fine, in 1709. *Henry* and his wife conveyed the wife's eſtate to truſtees and their heirs, in truſt to ſell and diſpoſe thereof, and of every or any part thereof, for payment of the ſaid debts, with intereſt and charges; and if any money ſhall remain in the truſtees hands, they were to pay it to the ſaid *Henry* and *Catharine* his wife, as the ſaid *Henry* and *Catharine* ſhould, by any writing duly executed before three more witneſſes, direct or appoint; the truſtees ſold all the lands except two farms, and paid all the debts; *Catharine* died in the life-time of her huſband; leaving iſſue only a daughter, who was married to the defendant, *Henry Collingwood*, by his will 4th of *Jan.* 1710 deviſes thus: I give to my dear brother *George Collingwood* (the plaintiff) all my lands and houſes with the appurtenances lying and being in *A.* to the uſe of him and his heirs, and dies, leaving no other lands in *A.* but the two farms above-mentioned, which were his wife's, and remained unſold after his death; the defendants entred on theſe two farms, claiming them as the inheritance of the mother, and that from her they deſcended to the defendant her daughter; and they inſiſted, that *Henry* had no power under the ſettlement to diſpoſe of the unſold farms, but that the ſame, or the truſt thereof, deſcended to the defendant; upon which this bill was brought for a diſcovery of the ſettlement and fine, and to have a conveyance from the truſtees. And it was inſiſted on for the plaintiff, that it appeared by the ſettlement, that all the eſtate was intended to be ſold; in which caſe *Henry* ſurviving would have been intitled to what was unſold, as he would have been to the purchaſe-money, if ſold, and conſequently had a power of diſpoſing thereof; and that the truſtees, after the truſts performed, ſtood ſeiſed in truſt for *Henry* and his heirs, who had by his will well deviſed the ſame to the plaintiff. The defendants inſiſted, that the reaſon of ſubjecting the whole eſtate to be ſold for the payment of debts, was, that there might be a ſufficient fund for that purpoſe, not to empower the truſtees to ſell the whole for the ſake only of turning it into money; when it appeared that part thereof would be ſufficient; that they had accordingly done their duty, in ſelling as much as was neceſſary; and for what remained unſold, it was a reſulting truſt for the defendant, the heir at law, and that as it was the wife's inheritance, it was not ſubject to the huſband's debts, but at her pleaſure; and when ſhe has been ſo kind as to let in them on her own eſtate, it would be unreaſonable to carry it further, and take away her whole eſtate from her, only to enable her huſband to give it away, and even diſinherit, as he has done in this caſe, both his own and his wife's only daughter and heir at law; and in this caſe there was an overplus in money, even of what was actually ſold, which the huſband gave away to a woman he had children by, and gave his own daughter but one *Guinea*. But my lord Chancellor was of opinion for the plaintiff, and decreed a conveyance

Vid. ante 272. pl. 1. 2 *Eq. Abr.* 506. *Let.* D. *per totum.* When lands are deviſed to be ſold to pay debts, the heir may pray the court that no more be ſold than is ſufficient, and the reſt ſhall reſult to him, or he may pay the debts and take the land; or if the truſtees ſell all, yet the ſurplus money (after debts paid) ſhall be in their hands as a truſt for the heir at law. In theſe caſes the truſtee has originally a power to ſell all, and yet, whether he does or does not, the reſidue (either land or money) unleſs otherwiſe particularly diſpoſed of, ſhall reſult for the benefit of the heir at law; and quer. whether the doctrine of theſe caſes ſhould not influence in this caſe, and produce a contrary decree.

conveyance to be made to him by the truſtees of the unſold eſtate, and ſaid, that the truſtees having power to ſell the whole it muſt be conſidered in equity as if actually ſold; in which caſe the money would have gone to the huſband, and ſo muſt the land too, elſe it would be in the power of the truſtees to make it land, or make it money at their pleaſure, and ſo to give it to whom they ſhould think fit; but the intention appearing to be, that the reſidue ſhould go to the huſband and wife, and the ſurvivor of them, it muſt go accordingly, whether land or money. *Paſch.* 1727. *Collingwood* and *Wallis.*

* 9. So where *A.* having five nieces, his coheirs at law, who had each of them ſeveral children, deviſed a very conſiderable eſtate to truſtees and their heirs, to be ſold, and to put the money ariſing by ſuch ſale, into five equal parts and ſhares, and out of each 5th part or ſhare, to pay 1000*l.* a-piece to the ſeveral younger children of each of his five nieces, and the reſidue of the money of each 5th part to be paid to ſuch of his ſaid five nieces as ſhould be then living; and in caſe of their deaths, then their ſhares to be equally divided amongſt their younger children, which ſhould be alive at the time the dividends were, or ought to be made; great part of this eſtate was ſold many years ſince, and the 1000*l.* a-piece to the ſeveral children of the five nieces had been paid; after which the nieces themſelves being intitled to the remainder of the truſt-eſtate, choſe not to have it ſold, but continued to receive the rents and profits thereof in five equal ſhares for ſeveral years and they being all now dead, the eldeſt ſon of each of them claimed it as a reſulting truſt for their reſpective mothers, and that from them it deſcended to their eldeſt ſons as heirs at law; and the rather, for that all the purpoſes, for which the truſt was created, being ſatisfied, their mothers might in their lifetimes have compelled the truſtees to have executed conveyances to them reſpectively of the unſold eſtate; and they, as their heirs at law, ſtood in their place, and had the ſame right; and that otherwiſe it would be in the truſtees power, by delaying or haſtening the ſale, to give the ſurplus to whom they pleaſed; and that it was now two years ago ſince the truſt was created, and yet great part of the eſtate remained ſtill unſold. But the court directed the reſt of the eſtate to be ſold, and the money to be divided among the younger children of each niece, according to the will, as it would have been if the nieces had died before the 1000*l.* a-piece to their younger children had been paid, or before ſufficient of the eſtate could have been ſold for the raiſing thereof; the teſtator plainly intending that the younger children of each niece, not their eldeſt ſons, or heirs at law, ſhould ſtand in their mother's place; and greatly blamed the truſtees for having ſo long delayed the ſale. *Paſch.* 1727. *Davers* and *Folkes.*

(G) *Truſtees, how to Account, and what Allowances to have.*

1. THE defendant was truſtee to the plaintiff an infant, and received for him 40*l.* in gold; the truſtee was robbed by his own ſervant, who lived with him in the houſe, of 200*l.* and this 40*l.* which laſt ſum was only proved by his own; yet my lord Chancellor allowed it on account, for he was but to keep it as his own. *Hil.* 30 *Car.* 2. *Morley* and *Morley*, 2 *Chan. Ca.* 2.

2. A Truſtee ſhall not be charged with imaginary values, but only as bailiff, tho' very ſupine negligence might indeed, in ſome caſes, charge a truſtee with more than he had received; but the proof thereof muſt be very ſtrong; and it is a hardſhip on him, that he is allowed nothing for his pains. 1 *Vern.* 144. *and ſaid, that it was a hard rule to charge a truſtee with what he had made, or might have made without his wilful default; but the reaſon was, becauſe the court could never yet find where elſe to fix the Meaſure.*

3. If a truſtee ſues for the truſt-eſtate, and obtains a decree with coſts of courſe, and the coſts taxed him are ſhort of his real coſts; and the *Ceſtui quæ truſt* exhibits a bill for an account of the truſt-eſtate; the truſtee, in his diſburſements, ſhall be allowed the full and neceſſary coſts, and ſhall not be concluded by the coſts taxed. *Hil.* 24 *Car.* 2. *Amand* and *Bradbourne*, 2 *Chan. Ca.* 138.

4. If two eſtates are conveyed to a truſtee for payment of ſeveral and diſtinct debts, and the heir at law brings a bill for an account, and afterwards prays that the bill may be diſmiſſed as to one of the eſtates, yet an account ſhall be taken of both eſtates. 1 *Vern.* 28.

5. *A.* deviſed 100*l.* a-piece to four children, payable at twenty-one, or marriage, with maintenance not exceeding the intereſt in the mean time; *B.* was appointed truſtee of a truſt-eſtate, to raiſe and pay the legacies aforeſaid; and he paid 20*l.* in placing out one of the children apprentice, who died before his age of twenty-one years; and the court held that the 20*l.* was laid out, and that the truſtee ſhould be allowed it. 2 *Vern.* 137.

6. But if a truſtee for the payment of childrens portions pays one of them his full ſhare, and the truſt-eſtate decays, he ſhall not be allowed ſuch payment, 2 *Chan. Ca.* 132. *per* lord Keeper; and it was urged, that though the appointment was to pay one in the firſt place, *&c.* yet it would not be good, as it did not denote preference in the quantity of the ſum to be paid; but my lord Keeper was of another opinion as to this point; but it was clearly agreed, that a ſpecifick legatee may pe paid in the firſt place; but for this *vide* title *Legacy*.

7. Although an executor or truſtee is not impowered or directed to place out money at intereſt; yet if he makes intereſt, he ſhall be accountable for it. *Paſch.* 1706. *Lee* and *Lee*, 2 *Vern.* 548. decreed accordingly.

* 8. But afterwards a difference was taken by my lord *Macclesfield*, *viz.* that if an executor or truſtee of money places it out in the funds, or on other ſecurity, whereby he gains conſiderably, that he ſhall have the whole benefit thereof to himſelf, in reſpect of the hazard he run of being a conſiderable loſer thereby, which he muſt have borne; but if ſuch truſtee or executor were an inſolvent perſon at the time of placing out ſuch truſt-money, there the *Ceſtui quæ truſt* ſhall have the whole benefit gained thereby, as he only could have borne the loſs thereof, if any had happened, the truſtee or executor, by reaſon of his inſolvency, being incapable thereof, and conſequently running no hazard at all. *Mich.* 1719. *Bromfield* and *Wytherly*.

10 *Mod.* 21. 12 *Mod.* 560. 1 *Salk.* 296. 2 *Atk.* 106. *Brown's Rep.* 360. S. C. cited and the diſtinction overr-uled, 1 *Term Rep.* 690.

(H) *How far Truſtees are anſwerable for each other.*

1. IF two truſtees for the ſale of a truſt-eſtate join in a conveyance of it to a purchaſer, and each of them receives 1000*l.*

Cro. Eliz. 318. *Comp.* 289. 2 *Br. Chan. Ca.* 114. ſee the caſe of *Churchill* and *Hopſon*, *P.* 247. *pl.* 2.—1 *Salk.* 318. S. C. and P.—2 *Vern* 504. 515.

1000*l.* and they likewiſe join in receipts for the conſideration-money, though afterwards one of them becomes inſolvent, yet the other is not liable to the money received by him; for their joining (without which the eſtate could not be ſold) was abſolutely neceſſary. *Cro. Car.* 312. 515. *Fellowes* and *Mitchell and Owen* S. P. and 1 *Will. Rep.* 81. S. C. and P.

2. But if two executors join in the ſale of the goods, *&c.* of the teſtator, they ſhall be both chargeable, tho' one of them only received the money, for there was no neceſſity for their joining. 2 *Vern.* 570. 1 *Salk.* 318.

CAP. LIV.

Waſte.

(A) *Waſte, in what Caſes reſtrained in Equity.*

1. IF there be leſſee for life, remainder for life, the reverſion or remainder in fee, and the leſſee in poſſeſſion waſtes the lands, tho' he is not puniſhable for waſte by the (*a*) common law; yet he ſhall be reſtrained in chancery, for this is a particular miſchief. 1 *Roll. Abr.* 377. *Moor* 554. S. P. 1 *Vern.* 23. S. P.

(*a*) That ſuch leſſee is not puniſhable by the common law, during the continuance of the remainder, tho' after its determination he is. *Vide. Co. Lit.* 54. 2 *Inſt.* 301. 5 *Rep.* 76.

2. But if ſuch leſſee has in his leaſe an expreſs clauſe of *without impeachment of Waſte*, he ſhall not be (*b*) injoined in equity. 1 *Vern.* 23.

(*b*) Although a court of equity will not aſſiſt a forfeiture, yet the tenant in poſſeſſion ſhall be reſtrained in equity from committing waſte in all caſes, in which waſte is puniſhable by law; and for this purpoſe an injunction will be granted before the bill is filed; alſo an injunction will be granted to ſtay waſte in behalf of an infant *in Ventre ſa mere*; equity will likewiſe, in ſome particular caſes, reſtrain the tenant from committing waſte, where it is diſpuniſhable by law, either by the nature of his eſtate, or by expreſs grant of *without impeachment of waſte*; but where by the agreement of the parties the leaſe is made without impeachment of waſte, equity will not reſtrain the leſſee from cutting timber, plowing, opening mines, *&c.* tho' ſuch leſſee ſhall be reſtrained from pulling down houſes, defacing ſeats, *&c.* *Hard.* 96. 1 *Chan. Rep.* 13, 14, 106, 116. 2 *Vern.* 392, 711. 1 *Salk.* 161. 2 *Chan. Ca.* 32. 2 *Chan. Rep.* 94.

3. *A.* on the marriage of his eldeſt ſon, in conſideration of 10000*l.* portion, ſettled (*inter alia*) *Raby Caſtle* on himſelf for life, without impeachment of waſte, remainder to his ſon for life, and to his firſt and other ſons in tail male; afterwards, having taken ſome diſpleaſure to his ſon, he got 200 workmen together, and of a ſudden ſtript the caſtle of the lead, iron, glaſs, doors and boards, *&c.* to the value of 3000*l.* and the court, on the ſon's filing his bill, granted an injunction to ſtay committing of waſte in pulling down the caſtle, and upon hearing the cauſe decreed not only the injunction to continue, but that the caſtle ſhould be repaired, and put in the ſame condition it was in; and for that purpoſe a commiſſion was to iſſue to aſcertain what ought to be repaired, and a maſter to ſee it done at the charge 2 *Chanc. Cas.* 32. *Gilb. Chanc.* 193. *Gilb. Eq. Rep.* 127. 3 *Bac. Abr.* 173, 4 *Preced. Chanc.* 454 S. C.

charge and expence of the father, and the ſon to have his coſts. *Hil.* 1716. *Vane* and *Lord Bernard*, 2 *Vern.* 738, 739. 1 *Salk.* 161. S. C. 1 *P. Wms.* 528.

* 4. If *A.* is tenant for life, remainder to *B.* for life, remainder to the firſt and other ſons of *B.* in tail male, remainder to *B.* in tail, *&c.* and *B.* (before the birth of any ſon) brings a bill againſt *A.* to ſtay waſte, and *A.* demurs to this bill, becauſe the plaintiff had no right to the trees, and none that had the inheritance was party; yet the demurrer will be over-ruled, becauſe waſte is to the damage of the publick, and *B.* is to take care of the inheritance for his children, if he has any, and has a particularly intereſt himſelf, in caſe he comes to the eſtate. *Trin.* 1700. *Dayrell* and *Champneſs.*

* 5. On a motion for an injunction to ſtay a jointreſs, tenant in tail after poſſibility, *&c.* from committing Waſte; it was urged that ſhe being a jointreſs within the 11th of *H.* 7. ought in equity to be reſtrained from cutting timber, that being part of the inheritance, which by the ſtatute ſhe is reſtrained from aliening; and the court granted an injunction againſt wilful waſte in the ſite of the houſe, and pulling down houſes. *Hil.* 1701. *Cooke* and *Whaley.*

* 6. But where a jointreſs, who had a covenant that her jointure ſhould be of ſuch a yearly value, which fell ſhort, tho' her eſtate was not without impeachment of waſte; yet the court would prohibit her committing waſte, ſo far as to make up the defect of her jointure. *Mich.* 1698. *Carew* and *Carew.* *But if an action of waſte be brought againſt her, if chancery will injoin the action.* Q.

Prec. in Chan. 15. S. C. ſays, the court without difficulty decreed it.

7. *A.* deviſed lands, on which timber was growing, to his wife for life, remainder to *B.* in fee, paying ſeveral legacies within a limited time, and in default of payment, the remainder to *C.* he paying the legacies; and on a bill brought by *B.* the court gave him leave to cut timber for the payment of the legacies, tho' it was oppoſed by the tenant for life and the deviſee over, he making ſatisfaction to the widow for breaking the ground by carriage, waſte, *&c.* *Trin.* 1690. *Claxton* and *Claxton*, 2 *Vern.* 152. *Gib. Chanc.* 338.

8. So where a man created a term for 500 years, in truſt for himſelf and his wife for life, remainder to truſtees for payment of debts and annuities; and by will deviſed the reverſion thereof to *A.* for life, without impeachment of waſte, remainder to his firſt and other ſons in tail male, with remainder over; and *A.* being in want, the court gave him leave to cut down timber to the value of 500*l.* tho' the debts and annuities were not paid; the truſtees having no power to ſell the timber, the debts being like to have a long continuance, and there being a great deal of decaying timber on the eſtate. *Hil.* 1900. *Aſpinwall* and *Leigh*, 2 *Vern.* 218.

CAP. LV.

Wills and Teſtaments.

(A) *What ſhall be eſtabliſhed in equity as a good Will of a Real Eſtate; and here of the circumſtances requiſite by the* 32 H. 8. cap. 1. *and the* 29 Car. 2. cap. 3.
(B) *Of Teſtaments and Nuncupative Wills.*
(C) *Fraud in obtaining a will where examinable.*
(D) *Of Republication, and in what Caſes it will make the will good.*
(E) *Of Revocations in equity.*

(A) *What ſhall be eſtabliſhed in equity as a good Will of a Real Eſtate; and here of the circumſtances requiſite by the* 32 H. 8. c. 1. *and the* 29 Car. 2. cap. 3.

1. BY the common law, no lands or tenements (except by particular cuſtom) were deviſeable by any laſt will or teſtament, neither could they be transferred from one to another, but by ſolemn livery of ſeiſin, matter of record or ſufficient writing. *Co. Lit.* 111. *b.* (*a*) Becauſe it was preſumed, that the teſtator would do that *in extremis*, that he would not do in his health; that it proceeded from the diſtemper of his mind, by the anguiſh of his diſeaſe, or by ſiniſter perſuaſion, to which in his ſickneſs he was more ſubject. 1 *Rol. Abr.* 608.

(*a*) The true reaſon ſeems to be from the nature of the feudal tenure, and the relation that was firſt eſtabliſhed betwixt the lord and his tenant. For tho' donations, after length of time, were made to the tenant and his heirs, or the heirs males or females of his body, under certain duties and ſervices expreſly reſerved, or which the law created; and tho' the word *heirs*, &c. be words of limitation, and appropriated to meaſure out the length or continuance of the eſtate; yet they were always underſtood the heirs of the preſent tenant, who being liable to the ſame ſervices when they came into the tenancy, the lord was to have the tuition and education of ſuch heirs, in caſe they happened, by reaſon of their minority, to be incapable of performing the ſervices, that ſo he might, by his care and diſcipline, ſecure to himſelf tenants always capable thereof, either in their own perſons, if they happened to be males, or by proper marriages with his tenants, if they proved to be females; and therefore by no act of the tanant's could he diſpoſe of the feud, ſo as to defeat the lord of the advantages of his ſeniority; and hence it was, that a tenant could not deviſe it, even to his own heir, ſo as to make him a purchaſer thereof; for then he coming in, not by the donation of the lord, but by the diſpoſition of the tenant, tho' he remained liable to the naked ſervices; yet the lord loſt the advantages of his wardſhip, marriage, &c. which were annexed only to thoſe who came in upon the terms of his own donation by deſcent.

2. But the (*a*) ſtatute 32 *H.* 8. *cap.* 1. enacts that every perſon (*b*) having manors, lands, &c. ſhall have power to give, (*c*) diſpoſe, will, and deviſe by will in (*d*) writing, or otherwiſe, by act executed in his life-time, all his ſaid manors, &c. any law, ſtatute, &c. to the contrary notwithſtanding, &c.

(*a*) There have been ſeveral reſolutions concerning wills made purſuant to this ſtatute, ſince the making thereof; but as the ſtatute 29 *Car.* 2. is now the proper pattern to follow, having altered the forms, by requiring more ceremony and greater exactneſs, it will be ſufficient barely to mention ſome of the caſes on this. (*b*) That the lands muſt be *ſua*, and therefore lands purchaſed after the will is made, will not paſs, *vide Plowd.* 344. Title *deviſe*, letter (*B*) (c) A deviſe of an authority to executors to ſell is within the act. *Moor* 341. *Cro. Jac.* 345 (*d*) A man beyond ſea wrote a letter, in which he declared his will to be, that his land ſhould go in ſuch manner; and adjudged a good will. *Moor* 177. *pl.* 314. So if a man had ordered one to make his will, and thereby to deviſe *White-acre* to *A.* and his heirs, and *Black-acre* to *C.* and his heirs, and he had written the deviſe to *A.* but before the deviſe to *C.* was wrote, the deviſor had died; yet as to *A.* this had been a good deviſe. 3 *Co.* 31. *b.* So a will was held good, where a lawyer took only ſhort notes, with deſign to reduce it into form, which he afterwards did; but the deviſor died before it was read to him. 1 *And.* 34. *Kelw.* 209. *Dyer* 72. 1 *Brown.* 44. A will wrote without the appointment of the teſtator, if read to him, and approved by him, good: ſigning and ſealing was not neceſſary. *Vide Cro. Eliz.* 100. *N. Dyer* 72. *a. March* 206. 2 *Leon.* 35. 1 *Sid.* 315. *Gilb.* on wills 375. *Gilb.* on deviſes, 85, *Powel* on ditto, 27.

3. An uncle having deviſed his eſtate from his nephew and heir at law, a younger brother of the heir at law, at the uncle's funeral, ſnatched the will out of the hands of the executor, and tore it in many ſmall pieces; but moſt of them, and particularly ſuch part wherein was the deviſe of the land, were picked up any ſtitched together again; and on a bill to have the will eſtabliſhed, it was decreed, that the deviſe ſhould (*e*) hold againſt the heir, and he to convey to him, altho' there was no direct proof made, that the heir directed the tearing of the will. *Mich.* 1702. *Haines* and *Haines*, 2 *Vern.* 441.

(*e*) A will tho' gnawn to pieces by rats in the life of the deviſor, if by joining the pieces together the contents can be known, will be good; ſo if a will continues in writing at the death of the deviſor, tho' gnawn, burnt or loſt after, it ſhall ſtand good. *Allen* 2, 55. A writing in form of an indenture, and ſealed and delivered, if proved to be intended a will, ſhall be good as ſuch. 1 *Chan. Ca.* 248. 1 *Mod.* 117

4. *A.* by will in writing, atteſted by three witneſſes, deviſed a copyhold eſtate to his wife; afterwards the teſtator, on the day of his death, directed his nephew to obliterate ſome deviſes, but nothing as to the copyhold deviſed to his wife, and then cauſed a *memorandum*, to be wrote, that he examined, peruſed and approved of the will as ſo obliterated and altered by his nephew, in his preſence, but did not republiſh it in the preſence of (*f*) three witneſſes, but directed his nephew to have it wrote out fair; but before it was brought back, he became delirious; and this was held a good will, as to the copyhold. *Paſch.* 1705. *Burkitt* and *Burkitt*, 2 *Vern.* 498.

(*f*) By the 29 *Car.* 2. *cap.* 3. it is enacted, that all deviſes of lands or tenements deviſeable by the ſtatute of wills, or any cuſtom, ſhall be in writing, and ſigned by the party devſing, or ſome other in his preſence, by his direction, and be atteſted and ſubſcribed in his preſence, by three or more credible witneſſes, or elſe ſhall be void.

5. If a will is atteſted by three witneſſes, who ſeverally ſigned their names, not being preſent together; yet each ſigning being in the preſence of the teſtator, makes it a good will within the ſtatute. 2 *Chan. Ca.* 109.

6. But if a man ſubſcribes and publiſhes his will in the preſence of two witneſſes, and they ſubſcribe it in his preſence, and after makes a codicil in writing, reciting that he had made a former will, and confirmed the ſame, (except what was exc epted by the codicil) and

declares, that the codicil ſhould be taken as part of his will, and publiſhes it in the preſence of one of the ſame and another witneſs; this is not a good will, for there was not three ſubſcribing witneſſes in the preſence of the teſtator; and one of the witneſſes to the codicil never ſaw the will. *Lea* and *Lib*, 3 *Mod.* 262. adjudged, though objected, the will and codicil made but one will, and the circumſtance of three witneſſes wanting to compleat the will, was perfected by the codicil.

7. So if a man makes a will in ſeveral pieces of paper, and there are three witneſſes to the laſt paper, and none of them ever ſaw the firſt; this is not a good will. 3 *Mod.* 263. *per Curiam.* A will void for want of witneſſes will not operate as an appointment to a charity. *Vide* 2 *Vern.* 498. and title *Charity*.

8. The teſtator deſired the witneſſes to go into another room ſeven yards diſtant, to atteſt his will, in which there was a window broken, thro' which the teſtator might ſee them; and it was held, that this will was according to the ſtatute of *Frauds*; for tho' the ſtatute requires atteſting in his preſence, to prevent obtruding another will in the place of the true one; yet it is enough if the teſtator might ſee; it is not neceſſary that he ſhould actually ſee them ſigning; for at that rate, if a man ſhould but turn his back, or look off, it would vitiate the will; and here the ſigning was in the view of the teſtator; he might have ſeen it, and that is enough; ſo if the teſtator, being ſick, ſhould be in bed and the curtain drawn. *Paſch.* 3. *Jac.* 2. *Shires* and *Glaſcock*, 2 *Salk.* 688. adjudged in *C. B.* on a feigned iſſue.

9. If the teſtator writes the will with his own hand, tho' he does not ſubſcribe his name, but ſeals and publiſhes it, and three witneſſes ſubſcribe their names in his preſence, it is a good will; for his name being wrote in the will, it is a ſufficient ſigning; and the ſtatute does not direct, whether it ſhall be at the top, bottom, &c. *Lemayne* and *Stapley*, 3 *Lev.* 1. adjudged *per totam Curiam*, and by three judges againſt one, the ſealing is a ſigning within the act: and *note*; it is not ſaid in the act, that the ſigning ſhall be in the preſence of three witneſſes at the ſame time. 3 *Mod.* 219.

(B) *Of Teſtaments and Nuncupative Wills.*

* 1. A. Being very ill, deſired *B.* to make her will, who wrote down only names and initial letters to this effect, *viz.* To *Tho. Weſt* 200 *l.* to *Jo. Dav.* 100 *l.* to *Reb. Cro.* 50 *l.* to *Sif.* to *Self* 10 *l.* and ſo to ſeveral perſons in like manner, to above 400 *l.* which being more than her eſtate, *B.* made an alteration in a ſecond column, by ſubſtracting part of the ſums from ſome of the legatees, as ſet down in the ſecond column, and then told *A.* the ſenſe of the propoſed deviſes; there were two perſons in the room that did not hear any thing that paſſed between *A.* and *B.* but only heard the teſtatrix at laſt pronounce, that all was well; *B.* went to a ſcrivener to have the deviſes drawn out at length and in form, and before ſhe returned the teſtatrix died; the judge below pronounced for this will; but upon an appeal to the delegates it was revers'd; and in this caſe it was agreed, that if the will had been written in words at length, ſo as they had carried a ſenſe and

meaning in themſelves, it had been a good will; for that there was one witneſs that wrote it, and two that heard the teſtatrix pronounce, that it was well; which would have been intended to have amounted to a ſecond witneſs, in regard it appeared on all hands, by ſeveral witneſſes, that the teſtatrix did then ſeriouſly diſpoſe herſelf to making her will; and for that was quoted the caſe of one *Pepper*, where a perſon diſpoſed herſelf to make her will, and dictated it to a perſon, who wrote it down; and another, not called in as a witneſs, lay behind the hangings out of curioſity, and yet ſuch will was allowed to be good, being proved by theſe two witneſſes, but they diſtinguiſhed this caſe, becauſe the will was not ſubſtantive, but was to take its ſenſe from the interpretation of the witneſs, and ſo there would be *Innuendo* upon *Innuendo*; which made it purely a nuncupative will; and as ſuch, not being atteſted by the number of witneſſes appointed by the *(a)* ſtatute of frauds and perjuries, the will and legacies were void. 26 *Feb.* 1710. *Davis* and *Gloceſter*, before the delegates.

(a) By the 29 *Car.* 2. *cap.* 5. it is enacted, that no nuncupative will ſhall be good, when the eſtate bequeathed exceeds the value of 30 *l.* that it is not proved by the oath of three witneſſes that were preſent at the making thereof, nor unleſs the teſtator bid the perſons preſent, or ſome of them, bear witneſs, that ſuch was his will, or to that effect; nor unleſs made in the laſt ſickneſs of the deceaſed, and in his dwelling-houſe, or where he had been reſident ten days, or more, before the making of the will; except where ſurpriſed and taken ſick from home, and died before his return; and by the ſame act, after ſix months paſſed after ſpeaking the pretended teſtamentary words, no teſtimony ſhall be admitted to prove any nuncupative will, unleſs the teſtimony or ſubſtance thereof was committed to writing within ſix days after the making the ſaid will.——And by the ſame act, no probate of any nuncupative will ſhall paſs the ſeal of any court, till fourteen days after the teſtator's death, nor ſhall be proved till proceſs have iſſued to call in the widow or next of kin to conteſt it, if they will; provided ſoldiers in actual ſervice, and mariners at ſea, may diſpoſe of their perſonal eſtate, as they might before the act.

2. Dr. *Shallmer*, by will in writing, gave 200 *l.* to the pariſh of *St. Clements Danes*, and after, *Prew* the reader coming to pray with him, his wife put him in mind, to give 200 *l.* more towards the charges of building their church, at which, tho' Dr. *Shallmer* was at firſt diſturbed, yet after ſaid he would give it, and bid *Prew* take notice of it; and the next day bid *Prew* remember of what he had ſaid to him the day before, and dies that day; within three or four days after, the Doctor's wife puts down a *memorandum* in writing of the ſaid laſt deviſe, and ſo did her maid; *Prew* died about a month after, and amongſt his papers was found a *memorandum* of his own writing, dated three weeks after the Doctor's death, of what the Doctor ſaid to him about the 200 *l.* and purporting that he had put it in writing the ſame day it was ſpoken; but that writing which was mentioned to be made the ſame day it was ſpoken, did not appear, and theſe three *memorandums* did not expreſly agree; about a year after, on application by the pariſh to the commiſſioners of charitable uſes, and producing theſe *memorandums*, and proof by Mrs. *Shallmer* and her maid, they decreed the 200 *l.* But on exceptions taken by the executors, the decree was diſcharged of this 200 *l.* and my lord chancellor held it not good, becauſe it was not proved by the oath of three witneſſes; for tho' Mrs. *Shallmer* and her maid had made proof, yet *Prew* was dead; and the ſtatute in that branch requires not only three to be preſent, but that the proof ſhall be by the oath of three witneſſes. *Trin.* 1704. *Philips* and *Pariſh of St. Clements Danes.*

Gilb. Eq. Rep. 146. S. C. *in totidem verbis.*

3. A daughter depoſits 180 *l.* in the hands of her mother (the defendant) and afterwards makes her will in writing, and thereby

deviſes ſeveral legacies, and makes her mother executrix, but takes no manner of notice of this 180 *l.* afterwards, by word of mouth, ſhe deſires her mother to give this 180 *l.* to the plaintiff, if ſhe thought fit, and then ſoon after died; the mother proved the will, and this bill was brought againſt her, to have the 180 *l.* paid. The mother by her anſwer, admits ſhe had ſuch a ſum in her hands; that her daughter did make ſuch a requeſt to her, but that ſhe left it to her election, whether ſhe would give it to the plaintiff, or not, by the very form of the deviſe; and inſiſted, that ſhe did not think fit to give it to the plaintiff. And in this caſe it was agreed, that this was not good as a nuncupative will, being above 30 *l.* and not reduced into writing within ſix days after the ſpeaking, as the ſtatute requires. 2*dly*, That if the defendant had inſiſted on the ſtatute of frauds and perjuries, the court could not have relieved the plaintiff, as upon a truſt; but in this caſe the defendant having by anſwer confeſſed the truſt, there was no danger of perjury, from varity of proof, which was the miſchief the ſtatute intended to provide againſt; and therefore the court *took it to be in nature* of a truſt, and decreed for the plaintiff; for the defendant expreſly ſwore ſhe did not think fit to give it to the plaintiff, and that the teſtator had left her at liberty. *But this decree was againſt the opinion of ſeveral at the bar, who thought it too hard on the election left in* the mother; but the court principally relied on the caſe of *Kingsman* and *Kingsman*, where a man deviſed away an eſtate of 2000 *l. per ann.* and upwards from his ſon and heir, to a bargeman, and by his will deviſed 20 *l. per ann.* to his ſon, with this clauſe, that if he behaved himſelf well, and gave no trouble or diſturbance concerning his will, that he might make it up 80 *l.* if he thought fit; and the court decreed the 80 *l. per ann.* to the ſon. *Paſch.* 1718. *Jones* and *Nabbs*. But *note; The* 80 l. per ann. *in the caſe of* Kingſman *and* Kingſman, *ſeems to have been decreed purely upon the circumſtances and hardſhips of the caſe; but in the preſent caſe there were no ſuch circumſtances or ingredients of hardſhip on the plaintiff.* But *Quære;* for it ſeems to be a truſt in the hands of the mother.

(C) *Fraud in obtaining a will, where examinable.*

1. A. Made his will, and thereby gave the plaintiff the greateſt part of his perſonal eſtate, to the value of 5000 *l.* as was proved in the caſe; but one *B.* his maid ſervant had in his ſickneſs prevailed on him (as was alledged) to make another will, and to marry her a week before his death, when he lay in his ſick bed, at ſix of the clock at night, tho' it was really proved by two miniſters, that ſhe was, a year before, actually married to the defendant *M.* and was then his wife, and that *M.* procured the licence for the marriage of *A.* to *B.* and this will being ſet up by *M.* executor to *B.* though it appeared there was as groſs a practice as could be in gaining the will, the teſtator being *non compos*, both at the time of making this will, and alſo at the time of this ſuppoſed marriage, and that in his health he knew that *M.* and *B.* were married, and that *B.* ſuppreſſed the firſt will; yet that will ſo ſet up, being proved in the prerogative court, and the matter in queſtion being purely relating to the perſonal eſtate, the lord chan. was of opinion, that whilſt the probate ſtood, this matter was not examinable in chancery; and tho' the fraud was fully proved, and as opened to him, he would not hear any proofs read, but diſmiſſed the bill. *Trin.* 1686. *Archer* and *Moſſe*, 2 *Vern.* 8, 9.

2. But tho' wills *(of perſonal eſtate only)* gained by fraud, and proved in the ſpititual court, are not to be *controverted in equity*, yet if the party claiming under ſuch will comes for any aid in equity, he ſhall not have it. *Trin.* 1688. *Nelſon* and *Oldfield*, 2 *Vern.* 76.

1 *Will. Rep.* 287. S. C. and P.

3. It being urged, that a will concerning *land* is only triable at common law, and that the party there may take advantage of any fraud or impoſition on the teſtator, and therefore not proper to be examined into, or ſet aſide in equity upon pretence of fraud or ſurprize; lord chancellor held, that there may be a fraud in obtaining a will that may be relievable in equity, and of which no advantage can be taken at law; as if a man agrees to give the teſtator 2000 *l.* in bank-bills, if he will deviſe his eſtate to him; and on the delivery of ſuch bills makes his will, and deviſes his eſtate to him, and the bills prove to be forged or counterfeit *(a)*. *Mich.* 1715. *Goſſe* and *Tracey*, 2 *Vern.* 700.

(a) Note; tho' this is a good will at law, yet it ſhall nevertheleſs be avoided in equity by the teſtator's heir for the *Fraud. Vide* 1 *Chan. Rep.* (*laſt Edit.*) 12, 16. inſtances of a will of *Land* being ſet aſide in equity for *Fraud.*

1 *Salk.* 237. 2 *Wilſon* 75. *Gilb.* on uſes, 116. *Powel* on deviſes 191. 3 *Burr.* 1490. *Cowp.* 94. *Douglaſs* 716. 1 *Term Rep.* 435. 2 *Term Rep.* 578. 3 *Term Rep.* 91. *Swinb.* 523 to 539. 1 P. *W.* 343 S. C. 3 *Wilſon* 497. 2 *Blackw.* 937. 7 *Br. Parl. Ca.* 344.

* 4. But it has been decreed in the houſe of lords, that a will of a real eſtate could not be ſet aſide in a court of equity for fraud or impoſition, but muſt firſt be tried at law, on *Deviſavit vel non*, being matter proper for a jury to inquire into. *July* 28th, 1728. *Bransby* and *Kerridge*.

(D) *What will amount to a republication, and where a republication will make the deviſe good.*

1. IF a man deviſes certain lands, and after aliens the land to a ſtranger, and repurchaſes; and after ſhews his intent, that the ſaid will ſhall be his will, this is a new publication, and the land ſhall paſs by the deviſe. 44 *E.* 3. 33 2. *R.* 3 3. *Vide* 1 *Vern.* 330.

2. So the teſtator's ſaying, his will was in a box in his ſtudy, amounted to a new publication. *Cotton* and *Cotton*, 2 *Vern.* 309. cited to have been tried before *North* Ch. Juſt.

Cotton and *Cotton* ſeems S. C. 1 *Freem.* 264. ſtates it: *A.* deviſed his lands in *D.* and all his other lands, unto his wife and after purchaſed other lands and then diſcourſing with *B. B.* deſired him to let him have thoſe new purchaſed lands at the rate that he bought them; *A.* anſwered no, for that he had made his will, and ſettled his eſtate, and intended that his wife ſhould have his whole eſtate. The court ſtrongly inclined that this was a new publication, and applied particularly to the lands; and that it was no matter for alledging *quod dixit animo teſtandi*, for that muſt neceſſarily be intended when the diſcourſe had particular reference to the will.——

2 *Chan. Rep.* 138, 140. S. C. ſays a trial at law having been had upon this point, a ſpecial verdict was found by C. J. *North*'s direction; and on a ſolemn argument all the judges of *C. B.* held it a republication of the will, and that the lands belonged to the wife, and that the court of chancery affirmed the judges opinion.

3. If a man ſeiſed of lands deviſes all his lands to *J. S.* and afterwards purchaſes the manor of *D.* and after writes in his will that *J. D.* ſhall be his executor; yet this is not any new publication to make the lands paſs. 1 *Roll. Abr.* 618. Note; *This caſe does not appear to have been reſolved, for in the book it is entered with a* dubitatur.

4. But if after the purchaſe of the manor of *D.* he delivers the firſt will as his will, and ſays that it ſhall be his will, without putting any words thereto; yet this is a new publication, to make the lands newly purchaſed paſs. 1 *Roll. Abr.* 618. 1 *Salk.* 237. 2 *Vern.* 209. 679. 3 *Com.* 7. *Powel* on deviſes 657. *Cowp.* 158. *Doug.* 31. 76. 716 *notis.* 1 *Term Rep.* 435.

5. So if a man ſeiſed of lands in *D.* deviſes to another, by his will in writing, all his lands in *D.* and after purchaſes other lands in *D.* and after one *J. S.* comes to him, and requeſts him to give him the buying of the lands laſt purchaſed; and he anſwers him, that he will not, but that his intent was, that thoſe lands ſhould go to his executors (for the deviſee was made executor by

the will) as his other lands ſhould; and after the deviſor cauſes a codicil to be writ, in which there is a deviſe of ſeveral perſonal things, as corn, and implements of houſhold, and annexes it to his firſt will; and after dies without other publication: yet this ſhall be a ſufficient publication to make the lands newly purchaſed to paſs by the will, for there needs no other words in the will than there were before; and his intent appears, that it ſhould be his will by annexing the codicil. 1 *Rol. Abr.* 618. *Moor* 404. S, C. *Cro. El.* 493. S. C. *Goulſ.* 150.

6. But if a man has iſſue two daughters, *A.* and *B.* and he deviſes lands to *A.* and to the heirs of her body, and for want of iſſue, to *B.* and *A.* dies in the life-time of the teſtator, leaving iſſue, though after the teſtator annexes a codicil to his will, and thereby diſpoſes of ſome part of his perſonal eſtate; yet this will not amount to a republication of the will, nor give any title to the iſſue of *A. Mich.* 1716. *Hutt and Simpſon*, 2 *Vern.* 722. reſolved *per Curiam*, though the teſtator had declared in his will, that *B.* had married againſt his conſent, and that what he had given her was in full of her portion, and in bar of any further part of his real eſtate.

7. If one deviſes a leaſe to his daughter, and afterwards renews the leaſe, and afterwards adds his codicil to his will, without taking any notice of the leaſe, whether the renewal of the leaſe is a revocation, and whether the adding a codicil to his will is republication, *Quere; & vide* 2 *Vern.* 209.

8. If a man has iſſue three ſons, *A. B.* and *C.* and deviſes lands to *B.* in tail, remainder to *C.* and *B.* has iſſue two ſons, and dies; and after the deviſor ſays, my will is, that the ſons of *B.* ſhall have the lands deviſed to their father, as they ſhould have had if he had lived, and had died after; and then the deviſor dies; whether this ſhould amount to a new publication *dubitatur*; two judges againſt two. *Fuller* and *Fuller*, *Cro. Eliz.* 422.

9. If *J. S.* has iſſue two ſons, *William* and *Robert*, and *Robert* has iſſue a ſon named *Robert*, and *J. S.* deviſes lands to his ſon *Robert*, and his heirs, and by the ſame will gives his grandſon 50 *l.* and *Robert* the ſon dies; and after *J. S.* by parol republiſhing his will ſays, *Robert* my grandſon ſhall take by my will as *Robert* my ſon ſhould have done; yet the grandſon ſhall not have the lands, for lands cannot paſs but by will in writing; and his ſon *Robert* cannot import his grandſon *Robert*, eſpecially when by the ſaid will he has made a diſtinction between ſon and grandſon. *Hil.* 30 *Car.* 2. *Strode* and *Berager*, 2 *Lev.* 243. The judgment to the contrary given by three judges againſt the opinion of *Scroggs* in the common pleas, is ſaid by the report to have been reverſed in *B. R.* (as he heard) though it was argued, that the words of the will were proper enough to paſs the lands to the grandſon; for the addition of grand, only imported a diſtinction between father and ſon while living; but that the father being dead at the time of the republication, the grandſon might properly be deſcribed by the name of ſon. 2 *Mod.* 313. S. C. 1 *Vent.* 341. 2 *Jon.* 135. *Raym.* 408.

2 *Vern.* 741. — 1 *Will. Rep.* 343.—*Prec. in Chan.* 459.—*Gilb. Eq. Rep.* 130. S. C. that it is no revocation. *Gilb.* 130 1 *P. Wms.* 343 2 *Mod.* 258. 2 *Atk.* 268.—4 *Burr.* 2512. *Comp.* 49. 87. *Browns Par. Cas.* 345. *Doug* 40. 3 *Wils* 497. 2 *Vaſs.* 037.

(E) *Of Revocations in Equity.*

1. A Man makes his will duly executed and atteſted according to the ſtatute of frauds and perjuries, and at the ſame time in like manner executes a duplicate thereof; ſome time after the teſtator having a mind to change one of his truſtees, orders his will

to be wrote over again, without any variation whatſoever from the firſt, ſave only in the name of that truſtee; and when it was ſo wrote over, he executes it in the preſence of three witneſſes, and the three witneſſes ſubſcribed their names, but not in his preſence; after this the teſtator cancels the duplicate, by tearing off the ſeal, and then dies; and the queſtion was, whether this ſecond will, not being good as a will to paſs lands, ſhould yet be a revocation of the firſt; and if it ſhould not, whether the cancelling the other ſhould be a revocation thereof within the ſtatute of frauds and perjuries. And it was decreed, that neither the making the ſecond, nor the cancelling the firſt, was a revocation thereof; though in the ſecond there was an expreſs clauſe, that he did thereby revoke all former and other wills; wherein my lord chancellor took this diſtinction, that the ſecond was not intended barely a revocation of the firſt, ſo as to ſignify his intention of dying inteſtate, or without any will; but it was intended as an effectual will to paſs the lands to the perſons, and in the manner thereby deviſed; and therefore, if it was not good as a will to that purpoſe, it was no revocation of the firſt, but as it was ſuppoſed to be valid as a will for paſſing the lands by the ſecond; (*a*) and if a man by his will deviſes lands to *A.* and after makes a ſecond will, and thereby deviſes the ſame lands to *B.* if this ſecond will be not good as a will to paſs the lands to *B.* it ſhall be no revocation of the deviſe in the firſt to *A.* for it is plain *A.* was to loſe only what *B.* was to gain; and if *B.* gains nothing by the ſecond, *A.* ſhall looſe nothing that was given him by the firſt; but if a man executes a ſecond will, which appears to have no other intention than to revoke the firſt, and to die inteſtate, though this ſecond be not in all circumſtances duly executed as a will whereby to paſs lands, yet it will operate as a revocation of the firſt; and as to the cancelling or tearing of the firſt will, that is no revocation of it in this caſe, becauſe that was no ſelf-ſubſiſting independent act, but done to accompany, or in a way of affirmation of the ſecond; it was done from an opinion, that the ſecond had effectually revoked the firſt, and therefore he tears the firſt, as of no uſe; but if the firſt was not effectually revoked by the ſecond, that act of tearing the firſt will not deſtroy it neither; for tho' a man may by the ſtatute of frauds as effectually deſtroy his will, by tearing or cancelling it, as by making a ſecond; yet if he does make a ſecond, and intends that as a revocation of the firſt, if it be inſufficient for that purpoſe, as in the principal caſe, the tearing and cancelling being only in conſequence of his opinion, that he made a good ſecond will, ſhall not deſtroy the firſt; but it ought to be ſet up again in equity. *Hil.* 1716. *Onyons* and *Tryers* decreed. *Vide* 3 *Mod.* 220, 258. 3 *Lev.* 86, 87.

(*a*) *Vid. Autem.* 2 *Equ. Abr.* 771. *C.* 8 & 9. where the cont' to this point of the caſe ſeems to have been holden.

2. But if a man cancels or revokes either the duplicate or original will, this is an effectual (*a*) avoiding of both, they being both but one will, and therefore muſt ſtand or fall together. 2 *Vern.* 742. *per Curiam;* and ſaid to have been ſo reſolved in Sir *Edw. Seymour's* caſe.

(*a*) By the 29 *Car.* 2. *cap.* 3. it is enacted, that no deviſe in writing of lands, tenements or hereditaments, or any clauſe thereof, ſhall be revocable, otherways than by ſome other will or codicil in writing, or other writing declaring the ſame, or by burning, cancelling, tearing or obliterating the ſame by the teſtator himſelf, or in his preſence, and by his direction and conſent, but ſhall continue, &c. unleſs altered by ſome other will or codicil in writing, or other writing of the deviſor, ſigned in the preſence of three or more credible witneſſes, declaring the ſame. And by the ſame act, no will in writing concerning perſonal eſtates ſhall be repealed, nor any clauſe or bequeſt therein altered by words, or will by word of mouth only, except the ſame be in the life of the teſtator committed to writing, and read to and allowed by him, and proved to be done by three witneſſes. —— But where a man by will in writing deviſed

the reſidue of his perſonal eſtate to his wife, and after, ſhe dying, he by a nuncupative codicil bequeathed to *J. S.* all that he had given to his wife; and it was reſolved good; for by the death of the wife, the deviſe of the reſidue was totally void; and the codicil was no alteration of the former will, but a new will for the reſidue. *Raym.* 334.

3. A man makes his will in writing, and thereby deviſes all his real and perſonal eſtate to his wife, her heirs and executors, in truſt to pay his debts and legacies, and then deviſes ſeveral legacies to his children and other perſons, and concludes, *In witneſs whereof I have, to this my laſt will and teſtament, containing nine ſheets of paper, and to a duplicate thereof, to be left in the hands of ſuch a one, ſet my ſeal to every ſheet thereof, and to the laſt of the ſaid ſheets my hand and ſeal, in the preſence of three witneſſes,* who all ſubſcribed their names in due form of law; afterwards the teſtator being minded to add other truſtees to his wife, and make ſome little alterations in his will, ſends for a ſcrivener, and gives directions to prepare a draught of inſtructions for another will, which the ſcrivener does accordingly, which the teſtator read over and approved very well, and ſets his hand to it; and being at a tavern, thinking he had now made a new will, he pulls out of his pocket the firſt will, and tears off the ſeals from the firſt eight ſheets, which the ſcrivener ſeeing, aſked him what he was doing? *Why (ſays he) I am cancelling my firſt will. Pray, (ſays the ſcrivener) hold your hand, the other will is not perfected, it will not paſs your real eſtate for want of being executed purſuant to the ſtatute of frauds* and *perjuries.* I am ſorry for that (ſays he) and immediately deſiſted from tearing of any more of the ſeals, and in ſome ſhort time after dies, without having done any thing further to perfect the ſecond will, or cancelling the firſt; after his death, on application to the ſpiritual court by the wife, who was made executrix of this laſt will, they ſentenced it a good will as to the perſonal eſtate, and admitted her to prove it; and on a bill brought by the legatees againſt the wife and other truſtees, to have a ſpecific performance of the truſt in the firſt will, and that the eſtate might be ſold purſuant to the directions of that will; it was inſiſted upon, that the firſt will was revoked, either by making of the ſecond, or by the tearing off the ſeals from the firſt. But lord chancellor held, that the ſubſequent will could be no revocation as to the real eſtate, not being executed according to the ſtatute of frauds and perjuries; and that as to the tearing off the ſeals from the firſt eight ſheets, that not being done *animo cancellandi*, was no revocation; *and that the ſeal remaining whole to the laſt ſheet was ſufficient, and in ſtrictneſs it was not neceſſary that all the ſheets ſhould be ſealed;* but becauſe the ſpiritual court had ſentenced the ſecond a good will of the perſonal eſtate, his lordſhip held it a good will for the whole perſonal eſtate, and that ſuch legatees of perſonalties in the firſt will, as are left out in the ſecond, muſt loſe their legacies; but for thoſe that had legacies by the firſt will, chargeable on the real eſtate, if the ſame legacies were deviſed to them by the ſecond will, that they ſhould ſtill continue chargeable on the real eſtate; provided ſuch legacies were not increaſed or inlarged by the ſecond will; for though the ſecond will was not ſufficient in itſelf to charge the real eſtate, yet ſince the real eſtate remained well deviſed by the firſt will, they ſhould be ſtill ſecured by thar real eſtate, for they were not deviſed out of land like a rent, but only ſecured by land, which before was well deviſed; but for other new abſolute perſonal legacies

3 *Chan. Rep.* 155. S. C. and degree; and adds, that all agreed that the ſecond will, tho' not ſealed and ſubſcribed, as the ſtatute of frauds directs; yet it is good for the perſonal eſtate, it being *caſus omiſſus* out of the ſtatute, and then it was good at common law. *Ibid.* 161.

deviſed by the laſt will, they ſhould be chargeable only upon the perſonal eſtate, and ſhould have the preference to be firſt paid out of the perſonal eſtate before the other legacies in the firſt will, charged upon the real eſtate, becauſe they had their ſeveral funds out of which they were to be paid; the perſonal legacies in the laſt will, out of the perſonal eſtate, which was well deviſed by that will and the legacies charged upon, or ſecured upon the real eſtate, which was deviſed by the firſt will, out of the real eſtate. *Hil.* 6 *Ann. Hyde* and *Hyde.*

4. If *A.* deviſes lands to *B.* and his heirs, and afterwards mortgages the ſame lands to *J. S.* for years, or in fee, tho' a mortgage in fee be a total revocation at (*a*) law, yet in equity it ſhall be a revocation *pro tanto* only. 1 *Vern* 329, 342, 97, 141, 182. 1 *Salk.* 158. S. P. admitted to be a ſettled point in equity.

(*a*) Vide 1 *Roll. Abr.* 616.

5. So if a man ſeized in fee deviſes it to *J. S.* in fee, or for life, and afterwards makes a leaſe to *J. D.* for years, this, even at law, ſhall not be a revocation, but during the years; for his intent does not appear further than during the term for years. *Mountague* and *Jefferies*, 1 *Roll. Abr.* 616

6. So if a huſband poſſeſſed of a term for forty years deviſes it to his wife, and after leaſes the land to another for twenty years, and dies, this leaſe is not any revocation of the whole eſtate, but only during the twenty years, and the wife ſhall have the reſidue by the deviſe. *Wilcox* and *Kent*, 1 *Roll. Abr.* 616.

7. But if *A.* deviſes lands to *B.* and his heirs, and twelve years after leaſes the ſame lands to *B.* for ſixty years, to commence after his death, and delivers the deed to a ſtranger, to the uſe of *B.* who does not deliver it to *B.* till after the death of *A.* this is a revocation of the whole eſtate; for both eſtates are not conſiſtent, nor can veſt in *B.* at the ſame time; and it was plainly the intention of the deviſor, that *B.* ſhould have the leſs eſtate only. *Hil.* 45 *Eliz. Coke* and *Bullock*, *Cro. Jac.* 42. adjudged, tho' objected, that it was the intention of *A.* that *B.* ſhould have his liberty to take by the leaſe or deviſe, *B.* not having agreed to the leaſe in the life of *A.*

2 *Freem.* 284. S. C. ſays lord keeper ſeemed to be of opinion that it was not a revocation, becauſe the three lives in the leaſe might die before the teſtator, and then the deviſe would take place; but referred it to the judges of *B. R.* by way of a caſe to determine. 2 *Equ. Abr.* 769. *pl.* 3. S. C.—

8. But if the leaſe made to the deviſee had been to begin either *in Præſenti* or *futuro*, in the life of the deviſor, it had not been a revocation; for inaſmuch as the leaſe might have determined in his life, it was conſiſtent with his will. *Cro. Jac.* 49. *per Curiam.*

9. So where *A.* by will deviſed to his younger ſon a certain meſſuage for ninety-nine years, if three lives lived ſo long, yielding and paying to his ſiſter, the plaintiff, 20 *l. per ann.* until twelve years old, and thence 40 *l. per ann.* for life; and afterwards the ſaid *A.* for 300 *l.* fine demiſed the ſaid meſſuage to *J. S.* for ninety-nine years, if three lives lived ſo long, yielding and paying 50 *l. per ann.* to *A.* the teſtator, his heirs and aſſigns; and tho' it was held at the rolls to be a revocation, yet on an appeal to my lord keeper, he decreed it to be no revocation, and that the daughter ſhould be paid her annuity; and he ſaid, that the rule is, where a ſubſequent act ſhall amount to a revocation by implication, it muſt be a neceſſary implication; and the act muſt be wholly inconſiſtent with the deviſe. *Paſch.* 1705. *Lamb.* and *Parker*, 2 *Vern.* 495.

2 *Freem.* 117. S. C. ſays, the lords commiſſioners *Trevor*, *Rawlinſon* and

10 So if *A.* deviſes lands to truſtees to pay his debts, and then to pay his wife 200 *l. per ann.* for her life; and the teſtator living ſeveral years after, his debts increaſed from 2000 *l.* to 10000 *l.* for 8000 *l.* whereof his ſaid truſtees were bound, and afterward *A.* the

teſtator, by deed and fine conveys his lands to his ſaid truſtees, to ſell to pay his debts, and the ſurplus to him and his heirs; and though the wife joined with him in the fine and conveyance, yet this ſhall be no revocation of the wife's 200 *l. per ann.* and ſhe ſhall have the 200 *l. per ann.* out of the ſurplus of the money, after the debts paid. *Mich.* 1691. *Vernon* and *Jones*, 2 *Vern.* 241. decreed; but the reporter adds a *Q.*

Hutchins were of opinion, that the ſurplus being to his own right heirs that was ſtill in his own power, and ſhould be ſubject to his diſpoſal by the will; and the caſe of *Hall* and *Deneh* was cited, where after a deviſe of lands the deviſor made a mortgage in fee; and adjudged that the deviſee ſhould have the equity of redemption. ——— *Prec. in Chan.* 32. S. C. ſays, the lords commiſſioners held that neither the mortgage and fine, nor deed of truſt, ſhall be a total revocation of the will, being made for particular purpoſes; but that after debts paid the widow ſhall have the 200 *l. per ann.*

11. But in a caſe where *Edward* earl of *Lincoln*, had mortgaged the manor of *S.* to the defendant *Wynn* and his heirs, for 12000 *l.* and afterwards, by his will, in default of iſſue male of his own body, deviſed it to Sir *Fran. Clinton* (who was to ſucceed him in the honour) for his life, with remainder to his firſt and other ſons in tail mail, with other remainders over; and appointed that his houſhold-goods at his chief houſe at S. ſhould remain there as *heir-looms* to the next heir male, who ſhould be *Earl of Lincoln*, and made Sir *Francis Clinton* executor; afterwards the Earl (who was very whimſical) took a fancy to one Mrs. *Calvert*, daughter to the lord *Baltimore*, and fancied he would marry her, (though it was proved in the cauſe, there never was any intention of ſuch marriage in her, or in any of her relations, nor any treaty about it,) and in this fancy he makes a leaſe and releaſe of thoſe premiſes to the defendants *Davenport* and *Townſend* and their heirs, (in conſideration of the ſaid intended marriage, as it was expreſſed,) to the uſe of himſelf and heirs, till the ſaid intended marriage took effect; then as to part in truſt for Mrs. *Calvert* and her heirs, in lieu of her dower, and as to the reſt in truſt that the truſtees ſhould ſell it, to diſincumber that part limited to Mrs. *Calvert*, and the ſurplus of the money to his executors and adminiſtrators; there was no further progreſs towards the marriage; and ſome time after the earl died, without any alteration of his will, and the honour deſcended to Sir *Francis Clinton* (who had but a very ſmall eſtate, if any,) who died ſoon after; and the plaintiff, his eldeſt ſon and heir, an infant of about ſeven years old, brought his bill to have the redemption of the mortgage, and a conveyance of the eſtate; and the defendants *A. B.* and *C.* who were couſins and coheirs of *Earl Edward*, brought a croſs-bill, that they might redeem and have the eſtate conveyd to them. And the only queſtion was, whether this leaſe and releaſe were a revocation of the will. It was ſaid for the plaintiff, that the earl had but an equitable intereſt (the whole eſtate being before mortgaged in fee,) and therefore it ought to be conſidered according to equity; and that tho' ſuch a leaſe and releaſe would have been a revocation of a deviſe of a legal eſtate, yet it will not be ſo here; for the reaſon the law goes upon in judging it a revocation is, becauſe the leaſe and releaſe is a conveyance of the eſtate, and ſo *ex neceſſitate rei* a revocation of the deviſe; and it is plain the law goes upon this, and not upon any ſuppoſed alteration in the perſon's will; for if a man makes a will, and thereby deviſes lands to *J. S.* and his heirs, and afterwards articles to ſell the lands to *J. D:* and his heirs, and receives the purchaſe-money and dies before any conveyance made, theſe articles will be no revocation of his will;

2 *Freem.* 202. S. C. reſolved that it was a revocation and upon an appeal ſo held *in Dom. Proc.* carried only by two lords.

and yet it is as plain his mind and intention, as to thoſe lands, is altered, as much as if he had actually made a conveyance to *J. D.* and in caſe of an equitable intereſt, the leaſe and releaſe makes no alteration of the eſtate, ſo as to induce a neceſſity of adjudging it a revocation, as there is in caſe of a legal eſtate; it is plain as to his intention, that he did not intend any revocation or alteration of his will, unleſs or until that marriage ſhould take effect, for by the releaſe it is limited, that till that marriage it ſhould be to him and his heirs, which is juſt as it was before; and that marriage having never taken effect, the eſtate continues juſt as it was; and it cannot be pretended, that this leaſe and releaſe are any expreſs revocation of his will; and the court of chancery is ſo far from following the ſtrict rules of legal revocations, that it often relieves againſt them; and therefore if a man deviſes *Blackacre* to *J.* S. and his heirs, and afterwards mortgages to *J. D.* and his heirs, this in law is a revocation of the deviſe, and yet in equity it ſhall be none farther than to let in the mortgage; and to this purpoſe were cited ſeveral caſes; and therefore ſince the court of equity muſt interpoſe for one ſide or t'other, it was concluded it ought to interpoſe for the preſent earl, and that he ought to have the redemption of the eſtate, as deviſed by the will of earl *Edward*. For the defendant it was ſaid, that ſuch a leaſe and releaſe would have been a revocation of a deviſe of a legal eſtate, and that equitable eſtates are governed by the ſame rules that legal eſtates are; and there is no fraud or circumvention nor other equitable circumſtances, to make the court vary from that rule in this caſe; and the will is in diſinheriſon of the heir, who is always favonred in all courts: and as to the caſes put, where mortgages heve been held to be no revocation in equity, it was ſaid the reaſon of that is, becauſe mortgages are not conſidered as conveyances of the eſtate, but only charges upon it; and my lord keeper was of this opinion, and decreed the plaintiff's bill to be diſmiſs'd, and the coheirs to have the redemption of the mortgage. *Trin.* 1695. the earl of *Lincoln* and *Rolls & al'*, *Show. P. C.* 154. and the decree affirmed in the houſe of lords.

* 12. So where Sir *John Huband* by will in writing dated the 12th of *Feb.* 1708, deviſed ſeveral pecuniary and ſpecific legacies, and then gave all the reſt of his real and perſonal eſtate, after all his debts and legacies paid, to *John Pollen*, on condition he took the name of *Huband* upon him and the heirs male of his body, with divers remainders over; afterwards, by leaſe and releaſe the 30th of *Aug.* 1709. Sir *John Huband*, together with *J. S.* his truſtee, conveyed ſeveral manors and lands in the county of *Warwick*, to truſtees and their heirs, to the uſe of himſelf for life without impeachment of waſte, and that the truſtees and their heirs ſhould execute ſuch conveyance and conveyances thereof, as the ſaid Sir *John* by writing under his hand and ſeal, or by his laſt will and teſtament, ſhould direct or appoint; and in 1710, Sir *John* died without altering or revoking the ſaid will, or making any other appointment touching the ſaid real eſtate; and the queſtion was whether this leaſe and releaſe were a revocation of the will, or not; the original bill of *Pollen* being to eſtabliſh the will, and th

croſs-bill to ſet aſide the will, and have an account of the profits; and it was decreed, that the leaſe and releaſe were a revocation of the will. *Mich.* 1712. *Pollen* and *Huband.*

13. *A.* having iſſue four daughters, and no male iſſue, deviſes lands to truſtees, in truſt to permit his daughter *S.* to receive the rents and profits until her marriage or death; and in caſe ſhe married with the conſent of two of the truſtees and her mother, then to convey the premiſes to her and her heirs; but if ſhe died before marriage, or married without ſuch conſent, then to convey to other perſons; afterwards *S.* marries in the life-time of her father, and with his conſent, and he ſettled part of thoſe lands on her and her huſband, and died; and it was held, that this ſettlement was no revocation of the will, as to the deviſe of the other lands. *Mich.* 1716. *Clarke* and *Berkley*, 2 *Vern.* 720. Vide *Where a deviſe ſhall be a ſatisfaction*, *title* deviſe, *letter* (L.)

Q. If this caſe was not affirmed *in Dom. Proc.* I think it was. *S. Ante* 112. *pl.* 8.

14. *A.* made his will, and thereof his brother executor, and deviſed unto his executor all his eſtate both real and perſonal, and four years afterwards he marries, and then by a codicil makes his wife his executrix; and the queſtion was, whether the brother ſhould have the perſonal eſtate; and it was urged, that he ſhould, for he does not take it as executor only, but by expreſs words of gift in the will; and it appears, that there was not only a benefit intended him as executor, for even the real eſtate was deviſed to him; but it being in proof, that he had not any the leaſt real eſtate in the world, it was ſaid by my lord chancellor, that the perſonal eſtate was deſigned him only as executor; and it was thereupon decreed for the widow, the executrix. *Mich.* 1681. *Wilkinſon* and ——— 1 *Vern.* 23.

2 *Atk.* 103. 2. *Vez.* 279. 1 *Will. Rep.* 304. in a note this reporter ſays, that this caſe was heard at the rolls, 8 *Decem.* 1701. where Sir *John Trevor* held that a ſubſequent marriage, and having children, was a revocation of a will of land, and diſmiſſed the bill of the legatees claiming legacies charged on the eſtate by ſuch will; and the reporter adds, that he finds in the regiſter's book that *Wright* lord keeper in *July* following reverſed the order of diſmiſſion, and decreed the payment of the legacies.

15. *J. S.* being a bachelor, made his will, and deviſed a legacy of 500 *l.* to his brother, and other legacies to other perſons, and deviſed his real eſtate to *Eliz. Cloſe* and her heirs, and afterwards intermarries with the ſame *Eliz. Cloſe*, and died, leaving her *privement enſeint* with a ſon, without making any alteration in his will; and the main queſtion in the caſe was, whether this alteration in the teſtator's circumſtances did of itſelf, without more ado, amount to a revocation of the will. Thoſe who argued for its being a revocation, relied on the caſe of one *Ayres*, *(a)* in which it was reſolved by the judges, that where a man that was unmarried made a will, and deviſed away his eſtate, and afterwards married and had a child, and died without making any revocation of his will, that this alteration of circumſtances was in itſelf a revocation of the will; and a caſe was cited out of *Cicero* *(b)*, where one thinking his ſon dead, l: iſed his eſtate to another, yet the ſon returning, held he ſhould have it, becauſe it was not to be ſuppoſed he would have diſinherited him without reaſon. On the other ſide it was argued, that tho' alteration of circumſtances might in ſome caſe amount to a revocation of a will; yet not in this, for here is nothing but what a reaſonable man might do, nothing unjuſt or unjuſtifiable; it appeared he had an intention of marrying *Eliz. Cloſe* when he made the will, though perhaps he might not know, when he died, that his wife was *enſeint*; or if he did, yet it is not

(a) 1 *Will. Rep.* 304. S. C. cited by Sir *John Trevor*, maſter of the rolls, and appears to have been the caſe of *Eyre* and *Eyre*, ſaid to be reported to Sir *John* by *Treby* C. J. and ſome eminent Civilians. *Ibid.* in a note. *(b) Vid. Cic. de Oratore Cantab. Ed. Pag* 69, 102. & *Dig. L. ult. de Hered. Juſt.*

uncommon for many, who are kind to, or fond of their wives, t leave their children wholly in their power, to make them the more dutiful to her, and that he muſt know the ſon would be the wife's heir as well as his, and would have the eſtate as ſuch, if ſhe did not diſpoſe of it from him. Lord keeper was clear of opinion, that alteration of circumſtances might be a revocation of a will of lands as well as of a perſonal eſtate; and that notwithſtanding the ſtatute of frauds and perjuries, which does not extend to an implied revocation; but no ſuch alteration appears here, for no injury is done to any perſon; and thoſe are provided for whom the teſtator was moſt bound to provide for; and ſo eſtabliſhed the will. *Trin.* 1702. *Brown* and *Thompſon.*

CAP. LVI.

Writs.

(A) *Of Writs of Error, and Writs mandatory, when to iſſue*

(B) *Of ſuperſeding Writs for what Cauſes.*

(A) *Of Writs of Error, and Writs mandatory, when to iſſue.*

1. A. Being indicted for not coming to church, and found guilty, application was made to the *Attorney General*; they might bring a writ of error; but he refuſed thereof; and thereupon the lord keeper was moved for ſuch a writ; but he ſaid, that though he had the cuſtody of the great ſeal, yet he would make no uſe thereof, but according to the courſe of the court, and therefore could not put the ſeal to a writ of error, till it had been firſt ſigned and allowed by the attorney general; and he took it, that a writ of error in a criminal matter was *ex gratia Regis* in all caſes, but where proviſion is made for the ſame by the ſtatute, and is not due *ex debito Juſtitiæ*, or *de curſu*; but if there were real error in the caſe, and a writ of error was not ſought for delay, the way was to petition the king, and he would give directions for inſpecting the proceedings, and ſee if there was real error, or whether a writ of error was ſought purely for delay. *Paſch.* 1683. *Crowle* and *Crowle*, 1 *Vern* 170. And the *Attorney General* ſaid, that *A.* being indicted on the ſtatute 3 *Jac.* 1. no error could avail him, and the indictment could not be quaſhed, nor the proceedings avoided, otherwiſe than by conformity.

2. A motion was made, that the lord keeper would grant a mandatory writ to the chief juſtice of the *King's Bench*, to command him to ſign a bill of exceptions in the caſe of the lord *Gray & al'*, who were convicted for a riot in *London*; and they produced a precedent, where, in a like caſe, ſuch writ had iſſued out of chancery to the judge of the ſheriff's court in *London*; but the lord keeper denied the motion, for that the precedent they produced

ced was to an inferior court, and he would not presume but the chief justice of *England* would do what should be just in the case; for possibly you may tender a bill of exceptions which has false allegations in it, and the like; and then he is not bound to sign it; for that might be to draw him into a snare; and said, if they had wrong done them, they might right themselves by an action on the case, and if this court had a power to grant such a writ, the same was discretionary only, *as writs of error are in criminal cases, which are discretionary, and not* de cursu. *(a)* Trin. 1683. 1 Vern. 175.

(a) Writs of error in criminal cases are not grantable *ex debito Justitiæ*, but *ex gratia Regis*; and in such case a man ought to make application to the king, and he will then refer it to his council, and if they certify there is error, the king will not deny a writ of error. 1. *Vern.* 175

(B) *Of superseding Writs, for what causes.*

*1. A. Being excommunicated for contumacy, and a writ of *De excommunicat' capiend'* awarded, it was moved for a *Supersedeas* to the writ, by reason that the *significavit* was general and uncertain; but it was said by the lord chancellor, that a *supersedeas* could not be granted on that ground; but if the excommunication were not for any of the offences within the statute 5 *Eliz.* and the *Significavit* did not express the same, the remedy expressly appointed upon that statute is a *Habeas Corpus*, and upon the return of it the parties shall be discharged; but it being then alledged, that an appeal was brought, and security given to prosecute it with effect, a *Supersedeas* was awarded, the lord chancellor saying, that the appeal was a *Supersedeas* of it self. *Mich.* 1681. *The King* versus *Sneller, Russel & al'.*

2. Upon a motion made for a *supersedeas* to a writ *De Cautione admittenda*, for that they had taken a writ to the sheriff, without any affidavit filed, that the bishop refused to admit of caution, and for that reason a *Supersedeas* was awarded; and the lord keeper declared, that finding this court often troubled for writs *De cautione admittenda*, he thought the right of it was, that if there was a sentence for a man to pay money, or do any other thing in the spiritual court, a man ought first to perform that, before he is admitted to his writ *De cautione admittenda*; for it is in vain to take security *Parere mandatis Ecclesiæ*, whilst a man refuses the sentence; but the reporter adds a *Quære*; for suppose a man be excommunicated for not coming to church, or not receiving the sacrament; how can he do that till his caution is admitted, and he absolved? *Hil.* 1682. *Archbishop of York* versus —— 1 *Vern.* 119.

* 3. An *Excommunicato capiendo* having been awarded, was on motion superseded before the return of it, for the generality of the *Significavit* whereon it was awarded, which was only that the party was excommunicated *in Quadam causa appellationis & Querelæ*; for the chancellor held clearly, that till the return of the writ, the court of king's bench cannot relieve him; and if this court cannot help him neither till the return of the writ, he must in the mean time lie in prison; and this he was clear in, without entering into the question which was made in this case, whether, after the writ returned and filed in *B. R.* according to the statute 5 *Eliz.* that court had not the sole power of proceeding on it; for till the writ returned and filed there, they had nothing to do with it, either by

way

way of quaſhing or ſuperſeding it on motion; and two precedents were cited 10 *Geo.* 1. where ſuch writs had been ſuperſeded *quia improvide eman'*, before the return in *B. R.* and he ſaid the caſes of *King* and *Fowler*, and of the biſhop of *St. Davids*, 1 *Salk.* 293, 294, may be good law, as the were after the writs returned and filed; and yet this court could not be ouſted of its juriſdiction in the mean time, before the returning and filing of the writ in *B. R.* And lord chancellor ſaid, that at the common law the *Excommunicato Capiendo* was not returnable till the *Pluries*, but went firſt, and then an *Alias*; and if that not obeyed, then a *Pluries*; and if not then returned, then an attachment to the ſheriff. *Hil.* 1727. *Barlow* and *Collins*.

* 4. *Thomas Bambridge*, late deputy warden of the *Fleet*, was indicted for the murder of one *Caſtle*, a priſoner in the *Fleet*, and acquitted; and the widow brought an appeal; the writ was directed to the ſheriff, and returnable the firſt day of next term in *B. R.* being iſſued out of the chancery; the writ was *Quia Maria Caſtle fecerit vos ſecur' per plegios A.* and *B.* (naming them particularly with their additions) *de appellâ ſuâ proſequend' ideo præcipimus vobis quod attachietis per Corpus, &c.* And now it was moved in chancery to ſuperſede this writ, for that in truth no pledges were found or entred, notwithſtanding the naming of them in the writ, as appeared by affidavit; and it was ſaid, that pledges in an appeal were grounded on the ſtatute of *Weſtm.* 2. which takes notice of vexatious appeals brought by perſons who had nothing to anſwer damages, in caſe they did not proceed, or that the appellee was acquitted; and the bringing of a man's life twice in jeopardy, was of ſuch conſequence, that if the appellor was not ſufficient to anſwer the damages, his pledges or ſureties ought, and therefore were they required to be real, and not fictitous perſons, like *John Doe* and *Richard Roe*; and they ought likewiſe actually to give ſecurity to proſecute the appeal. That they could not move in the king's bench to quaſh this writ, becauſe it was not returnable there till the firſt day of the term; and if they could not move to ſuperſede it here, a man muſt lie in priſon without bail or mainpriſe for a whole long vacation, as *Bambridge* has done in this caſe, upon an erroneous writ, without redreſs. It was alſo argued, that the writ was abſurd, and neither grammar nor ſenſe; for it ſhould have been *Si Maria Caſtle fecerit vos ſecur'*, and not *Quia vos fecerit*, the word *Quia* relating to the time paſt, and the word *fecerit* to a time future; and that the precedents are, *Si A. B. fecerit vos ſecur'*, in the nature of a condition precedent; ſo that till the appellor has made the ſheriff ſecure, by finding of ſureties, he is not to attach him; or it ſhould have been *Quia A. B. nos fecerit ſecur'*; ſo that the ſureties are either to be given to the king before the iſſuing of the writ, and then it is *Quia nos*, or to the ſheriff after the iſſuing thereof, and then it is *ſi A. B. fecerit vos*; and ſo are the precedents in *Raſtal* 44, 46. *Co. Ent.* and others; and the ſheriff may return to the writ, *Non invenit Plegios*; and though it is ſaid in 2 *Jon.* 154. and other books, that the appellor may find ſureties at any time before judgment, that cannot be; for then, if the appellor finds that the appellee is likely to be acquitted, he will never demand judgment at all, and then the party's life may be brought

twice

twice into danger, and yet, have no recompence in damages againſt an unjuſt appeal; and it was reſembled to an *excommunicato capiendo*, which is returnable in *B. R.* they cannot move there to quaſh the writ till it is returned and filed, becauſe till then the writ is not in court, but in the ſheriff's hands; but if the writ iſſued *erronice* or *improvide*, this court from whence it iſſued, may call it in or ſuperſede it; and the great ſeal ought not to be affixed to an errroneous or irregular writ; but it was argued on the other ſide, and agreed by my lord chancellor, that this writ did not iſſue *erronice* or *improvide*, that that muſt be ſomething extrinſick to the writ itſelf, that if there be any defect in the writ, they may move to quaſh it when it comes into the *king's bench*, if they think fit; that by the precedents in *Raſtal*, and 2 *Jon.* 154. it appears, that the appellor may find ſureties in court, if the ſheriff return *non invenit plegios*, or even at any time before judgment; that the ſtatute of *Weſtminſter* the ſecond, was not made for the finding of pledges, but for the puniſhment of the abettors; and that there were very many precedents, where no ſureties were actually found; that the ſheriff may, if he will, attach the party without finding pledges, becauſe they may be found afterwards, or he may refuſe to attach him, and return *quia non invenit plegios*; that *quia A. B. fecerit vos ſecur'*, becauſe the party will find pledges, is as good as *ſi fecerit*; and that the party may either find ſecureties to the king, and then it is *quia nos*, or to the ſheriff, and then it is, *ſi vos*, &c. ſo the motion was diſallowed. *October* the 14th, 1729. *Bambridge's* caſe.

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